IN THE

Supreme Court of the United States

October Term, 1973

No. 73-180

GATEWAY CENTER CORPORATION,
Petitioner

and

ROBERT L. KUNZIG, Administrator, General Services Administration, A. J. SAMPSON, Commissioner, Public Building Service of the General Services Administration, L. M. SHIPP, JR., Assistant Commissioner, Space Management of the General Services Administration and the GENERAL SERVICES ADMINISTRATION of the United States of America,

v.

JOHN W. MERRIAM, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

DAVID F. MAXWELL
Attorney for Petitioner,
Gateway Center Corporation

Of Counsel:
OBERMAYER, REBMANN, MAXWELL & HIPPEL
19th Floor
Packard Building
Philadelphia, Pennsylvania 19102

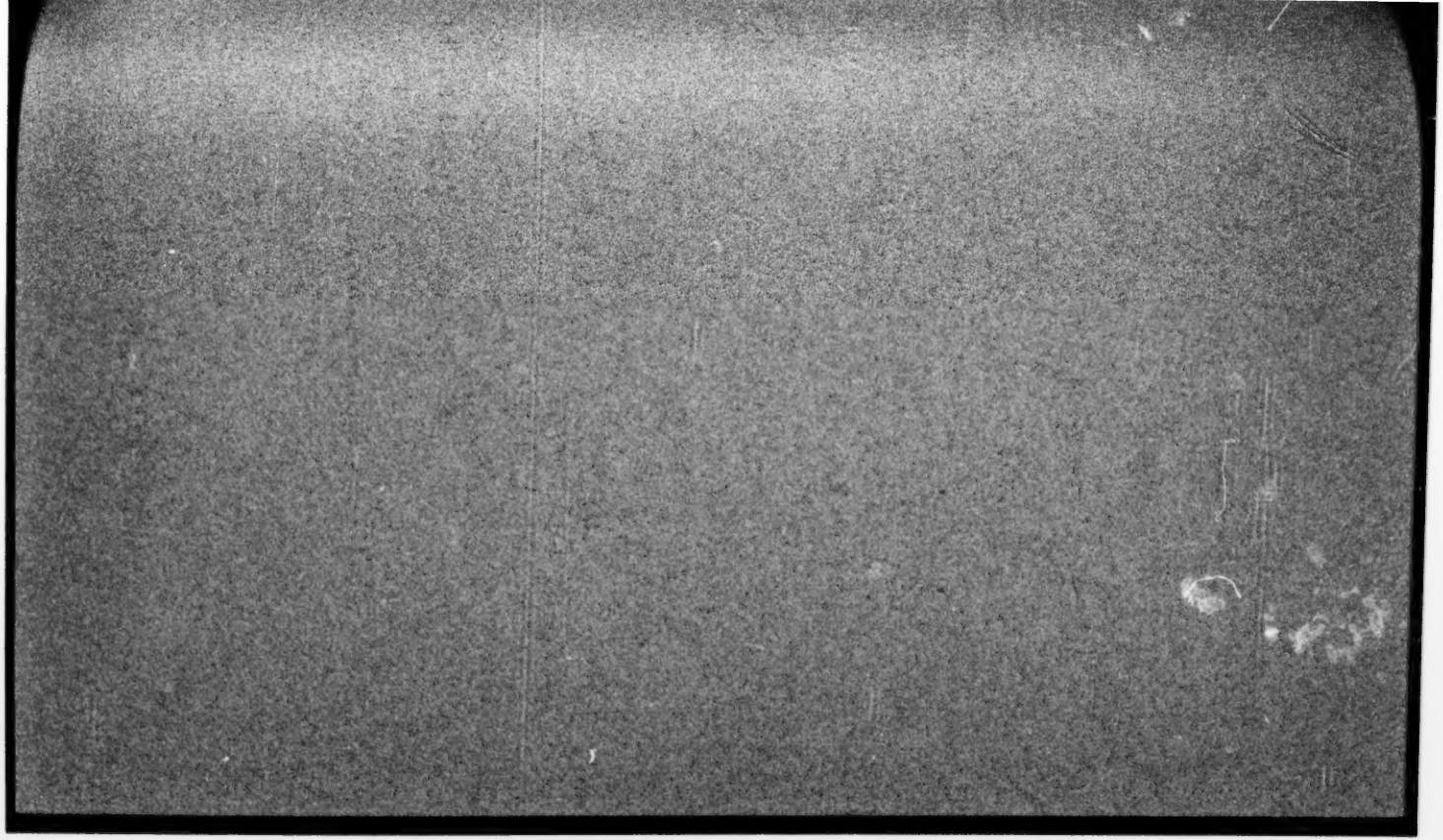


TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdictional Statement	2
Statement of the Issues	3
Constitutional and Statutory Provisions	3
Statement of the Case	5
Reasons for Granting the Writ	7
Conclusion	22

TABLE OF CITATIONS

Cases:

Allen M. Campbell Co., General Contractor, Inc. v. Lloyd Wood Construction Co., 446 F.2d 261 (1971) 9

American Smelting & Refining Co. v. United States, 259 U.S. 75 (1922) 11

Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970) 9, 10

Ballerina Pen Co. v. Kunzig, 433 F.2d 1204 (1970) 9

Barlow v. Collins, 397 U.S. 159 (1970) 10

Blackhawk Heating & Plumbing Co. v. Driver, 433 F.2d 1137 (1970) 9, 14, 17

City Railway Co. v. Citizens' Street Railroad Co., 166 U.S. 557 (1897) 21

Constructores Civiles de Centroamerica S.A., v. Hannah, 459 F.2d 1183 (1972) 9, 14

Edelman v. Federal Housing Administration, 382 F.2d 594 (1967) 9, 12

Friend v. Lee, 221 F.2d 96 (1955) 14

TABLE OF CITATIONS—*(Continued)*

Cases: Page

Gary Aircraft Corporation v. United States, 342 F. Supp. 473 (1972) 12

Keco Industries v. United States, 428 F.2d 1233, 192 Ct. Claims 773 (1970) 9

M. Steinthal & Co. v. Seamans, 455 F.2d 1289 (1971) ..9, 17

Perkins v. Lukens Steel Co., 310 U.S. 113 (1940) 9, 16

Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (1970) 9, 13, 14, 16

Sierra Club v. Morton, 405 U.S. 727, 92 S. Ct. 1361, 31 L.Ed. 2d 636 (1972) 10

Twenty Percent Cases, 20 Wall 179 (1874) 21

United States v. St. Louis, San Francisco & Texas Railway Co., 270 U.S. 1 (1925) 21

Wheelabrator Corporation v. Chafee, 455 F.2d 1306 (1971) 9, 14, 18

Constitutional Provisions:

United States Constitution, Amendment V 21

Statutes:

5 U.S.C. §702 .....4, 9, 10

28 U.S.C. §1254(1) 2

40 U.S.C. §606(a) 4

41 U.S.C. §252 .....3, 5, 15

41 U.S.C. §253 ..... 4, 7

84 Stat. 1448 .....4, 19

85 Stat. 115 .....4, 19

Federal Procurement Regulations:

41 C.F.R. §1-3.805-1 8

Executive Orders:

35 Fed. Reg. 3979 .....3, 7, 19

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No.

GATEWAY CENTER CORPORATION, *Petitioner*
and
ROBERT L. KUNZIG, Administrator,
General Services Administration
A. J. SAMPSON, Commissioner,
Public Building Service of the
General Services Administration,
L. M. SHIPP, JR., Assistant Commissioner,
Space Management of the General Services
Administration and the GENERAL SERVICES
ADMINISTRATION of the United States of America

v.

JOHN W. MERRIAM, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Gateway Center Corporation, a Defendant herein, prays that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit to review the judgment of that Court in reversing the Order of the United States District Court for the Eastern District of Pennsylvania.

The General Accounting Office decision not to rule on the Plaintiff's protest of the award of the contract to Gateway Center Corporation is set forth in Decision B-171958 of the Deputy Comptroller General, dated September 16, 1971, and the reasons for this decision are set forth in Decision B-171958, dated March 17, 1972, and set forth fully at (appendix p. 19a).

OPINIONS BELOW

The Opinion of the United States District Court for the Eastern District of Pennsylvania, entered on June 26, 1972 and set forth fully at (Appendix, p. 36a), is reported at 347 F. Supp. 713. The Opinion of the United States Court of Appeals for the Third Circuit, entered on February 16, 1973 and set forth fully at (Appendix, p. 66a), is reported at 476 F.2d 1233. The Order of the United States Court of Appeals for the Third Circuit denying defendants' petition for rehearing, which includes the dissenting Opinion of Circuit Judge Adams, was entered on April 27, 1973, and it too is reported at 476 F.2d 1233. This Order is set forth fully at (Appendix, p. 87a).

JURISDICTIONAL STATEMENT

The Order of the United States Court of Appeals for the Third Circuit was entered on February 16, 1973. The Defendants' Petition for Rehearing was denied on April 27, 1973. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE ISSUES

1. Whether the Plaintiff, an unsuccessful offeror of space to house various federal agencies, has standing to maintain an action to protest the General Services Administration's decision to accept another offer in a transaction in which the government, pursuant to the procedures provided under 41 U.S.C. §252, negotiated the contract instead of employing the formal process of advertising for sealed bids pursuant to the provisions of 41 U.S.C. §253?

2. Whether this contract is prohibited by the Independent Offices Appropriations Act for 1971, when no money for this project was expended under that Act, or by the Public Buildings Act Amendments of 1972, which the Court of Appeals applied retroactively to this 1971 contract?

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Section 302 of the Federal Property and Administrative Services Act, June 30, 1949, 63 Stat. 393, as amended, 41

U.S.C. §252, is set forth in full at (appendix p. 2a).

Section 303 of the Federal Property and Administrative Services Act, June 30, 1949, 63 Stat. 395, as amended, 41 U.S.C. §253, is set forth in full at (appendix, p. 1a).

The Public Buildings Act Amendments, June 16, 1972, Pub. L. No. 92-313, 86 Stat. 217, 40 U.S.C. §606(a), are set forth in full at (appendix p. 16a).

Section 10 of the Administrative Procedure Act, September 6, 1966, Pub. L. No. 89-554, 80 Stat. 392, 5 U.S.C. §702, is set forth in full at (appendix, p. 4a).

The Independent Offices Appropriations Act for 1971, Dec. 17, 1970, Pub. L. No. 91-556, 84 Stat. 1448, is set forth at (appendix, p. 10a).

The Independent Offices Appropriations Act for 1972, July —, 1971, Pub. L. No. 92-49, 85 Stat. 115, is set forth in pertinent part at (appendix, p. 13a).

Federal Procurement Regulation 1-3.805-1, 41 C.F.R. §1-3.805-1, is set forth in full at (appendix, p. 7a).

STATEMENT OF THE CASE

On September 16, 1971, the Plaintiff, John W. Merriam, commenced this action, in the United States District Court for the Eastern District of Pennsylvania, seeking an Order to vacate a contract which the General Services Administration (GSA) had negotiated with Gateway Center Corporation in an effort to provide office space for various Federal Agencies in Philadelphia. GSA has issued solicitation for offers No. (70)-63 on September 30, 1970, and it received several offers, including those of the Plaintiff and Gateway Center Corporation. The contract was negotiated in order to obtain the most favorable terms, as it did not lend itself to the formal procedure of advertising for sealed bids because space was offered in diverse buildings and sites. Thus the nature of the solicitation made it impracticable to compare the offers on the basis of final price and the other criteria normally associated with the sealed bid procedure. GSA elected to solicit offers under 41 U.S.C. §252, which empowers the GSA to negotiate a contract, and it did not elect to proceed under 41 U.S.C. §253, the Statute providing for the formal procedure of advertising for bids.

After extended negotiations and substantial changes, GSA awarded the contract to Gateway Center Corporation, and the Plaintiff filed a protest of award with the General Accounting Office (GAO). The lawsuit was commenced against the Federal Defendants after the Deputy Comptroller General decided that the GAO should not act on this protest, and, on November 1, 1971, the Defendants moved for summary judgment, alleging that the Court lacked jurisdiction over the action, that the Plaintiff lacked standing to prosecute the action, and that the issue was moot.

On June 26, 1972, the District Court dismissed the Complaint on the sole grounds that the Plaintiff lacked standing to sue and it did not reach the issue of mootness.

On February 16, 1973, the Court of Appeals reversed the Order of the District Court and remanded the cause for further proceedings. On April 27, 1973, the Court of Appeals denied Defendants' Petition for Rehearing. Circuit Judge Adams filed an Opinion dissenting from this Order, and his opinion was addressed to the issue of the Plaintiff's standing to sue.

Thereafter, on June 29, 1973, Gateway Center Corporation, which had relied upon its contract with the Government to the extent of not seeking other tenants for the building, was permitted, upon consent of all of the parties, to intervene as a Defendant in this action, and it files this Petition for Certiorari.

REASONS FOR GRANTING THE WRIT

The Court of Appeals based its Opinion upon an analysis of the standing of a disappointed bidder to maintain an action to protest violations of the statute providing for Government procurement pursuant to the formal, two-step process of advertising for bids, 41 U.S.C. §253, 66 Stat. 594, 476 F.2d at 1242. The basis for the Court of Appeals' decision is, however, inapposite since this case involves a transaction in which the government proceeded under the alternative method of negotiating the contract instead of advertising for sealed bids. Solicitation for offers, No. NEG(70)-63, which was sent to Plaintiff and to Gateway Center Corporation among others, specifically states that "Offers are solicited under Section 302(c)(10) of the Federal Property and Administrative Services Act of 1949 (63 Stat. 377), as amended, . . ." (Appendix, p. 2a). This Statute provides that:

> "(c) All purchases and contracts for property and services shall be made by advertising, as provided in section 253 of this title, except that such purchases and contracts *may be negotiated* by the agency head without advertising if —
>
> * * *
>
> (10) for property or services for which it is impracticable to secure competition: . . . [Emphasis added.]

41 U.S.C. §252, 63 Stat. 377.

This initial error led the Court of Appeals to further mistake the true nature of the controversy raised by the Plaintiff's Complaint. In the case of advertised bids, the contract must, by statute, be awarded to the lowest responsible bidder. 41 U.S.C. §253(b), 63 Stat. 395.

A negotiated contract, on the other hand, involves agency consideration of many factors in addition to price. In the instant case, GSA was seeking office space, and the interested parties therefore offered facilities having different layouts and different locations. Some of these facilities were housed in new buildings, and some were in older buildings. Moreover GSA was enjoined by the President to consider the socio-economic impact of each proposed location for the new Federal offices, and, whenever possible, to place them where they could most contribute to the redevelopment of a deteriorating area. Executive Order No. 11512 (Appendix, p. 4a). This extensive exercise of GSA's discretion is, furthermore, entirely compatible with the flexibility in contracting which is provided by Procurement Regulation 1-3.805-1. This Regulation, which deals with selection of offerors for negotiation and award, states that ". . . award of a contract may be influenced by the proposal which promises the greatest value to the Government in terms of possible performance, ultimate producibility, growth potential, and other factors." 41 C.F.R. §1-3.805-1.

Since the Statute governing negotiated contracts such as that involved in the instant case clearly imposes duties different and more extensive than those imposed by the Statute relied upon by the Court of Appeals in its Opinion, that Court's error in applying the wrong statute naturally led it to render an opinion which conflicts with the doctrines of standing, established by this Court, and followed in other Circuits. It should be noted, moreover, that the Court of Appeals remanded this cause for further proceedings in the District Court, and its action therefore constitutes a final decision on the issue of standing.

A. The Court of Appeals decision directly conflicts with the decisions of this Court.

The Order of the Court of Appeals for the Third Circuit, which held that the Plaintiff had standing to proceed

in the District Court, is the first instance of any court's finding that an unsuccessful offeror who failed to negotiate a contract with GSA, nevertheless has standing to protest the award of that contract; ordinarily the Government is conceded the right to choose those with whom it will do business. Indeed, every case in which the Court has granted standing involves a disappointed bidder who is protesting alleged violations of the Statute governing formal advertisements for bids.[1]

This decision is, moreover, one which directly conflicts with the applicable decisions of this Court, decisions which constitute binding precedent for the Court of Appeals for the Third Circuit. In *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 60 S. Ct. 869, 84 L. Ed. 1108 (1940), this Court specifically held that the statutes governing the award of public contracts confer standing to protest such awards *only* upon the Government, 310 U.S. at 125, and this case has never been overruled.

Furthermore, it is clear that the reasoning in the *Perkins* case is as valid today as it was when that case was decided in 1940. The Plaintiff commenced the instant action under section 10 of the Administrative Procedure Act, 5 U.S.C. §702, 80 Stat. 392, the same statute which this Court recently construed both in the 1970 cases of *Association of Data Processing Service Organizations, Inc.*

1. See e.g., *Constructores Civiles de Centroamerica, S.A. v. Hannah*, 459 F. 2d 1183 (D.C. Cir. 1972); *M. Steinthal & Co., Inc. v. Seamans*, 455 F. 2d 1289 (D.C. Cir. 1971); *Wheelabrator Corp. v. Chafee*, 455 F. 2d 1306 (D.C. Cir. 1971); *Allen M. Campbell Co., General Contractor, Inc. v. Lloyd Wood Construction Co.*, 446 F. 2d 261 (5th Cir. 1971); *Blackhawk Heating & Plumbing Co. v. Driver*, 433 F. 2d 1137 (D.C. Cir. 1970); *Ballerina Pen Co. v. Kunzig*, 433 F. 2d 1204 (D.C. Cir. 1970), cert. den. 401 U.S. 950 (1971); *Keco Industries v. United States*, 428 F. 2d 1233, 192 Ct. Claims 773 (Court of Claims 1970); *Scanwell Laboratories, Inc. v. Shaffer*, 424 F. 2d 859 (D.C. Cir. 1970); *Edelman v. Federal Housing Administration*, 382 F. 2d 594 (2d Cir. 1967).

v. Camp[2]; *Barlow v. Collins*[3], and in the 1972 case of *Sierra Club v. Morton*[4]. This Act accords standing to any person "aggrieved by agency action within the meaning of the relevant statute" (5 U.S.C. Section 702, 80 Stat. 392), and it thus allows him to obtain judicial review of that action. A person is "aggrieved" within the meaning of the relevant statute if, due to a violation of that statute, he (a) suffers "injury in fact" and (b) suffers this injury to an interest "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question". *Data Processing*, *supra* at 152, 153; *Barlow*, *supra* at 164. Moreover, this analysis of the principles of standing was affirmed two years later in *Sierra Club v. Morton* decision, 405 U.S. 727, 92 S. Ct. at 1365, 31 L. Ed. 2d 636.

Under these principles, the Court's reasoning in *Perkins*, *supra*, is still valid: that decision was based upon a finding that the public contract laws were enacted solely for the protection of the government, and that other persons therefore did not even arguably come within the zone of interests protected by these statutes:

> "Section 3709 of the Revised Statutes requires for the Government's benefit that its contracts be made after public advertising. It was not enacted for the protection of the Sellers and confers no enforceable rights upon prospective bidders. The United States needs the protection of publicity, form, regularity or returns and affidavit . . . in order to prevent possible frauds upon it by officers. A private person needs no such protection against a written undertaking signed by himself. The duty is imposed upon officers of the Government, not upon him. The duty is owning to the Government and to no one else."

---

2. 397 U.S. 150, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970).
3. 397 U.S. 159, 90 S. Ct. 832, 25 L. Ed. 2d 192 (1970).
4. 405 U.S. 727, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972).

310 U.S. at 125, 60 S. Ct. 869, 84 L. Ed. 1108 (1940); see also *American Smelting & Refining Co. v. United States*, 259 U.S. 75, 42 S. Ct. 420, 66 L. Ed. 833 (1922).

The holding of the Court of Appeals that the interests of the offeror, disappointed after failing to negotiate a contract with the Government, arguably come within the zone of interests protected by the Federal Property and Administrative Services Act (the negotiation Statute) thus directly contravenes this Court's holding in *Perkins* that public contracts statutes protect only the interests of the Government. Therefore, the Court of Appeals' decision cannot stand unless this Court decides to overrule the *Perkins* line of cases.

Moreover, this holding was based on nothing more than an assumption by the Court of Appeals that the Plaintiff came within the zone of interests arguably protected by that Statute; the Court did not investigate the legislative history or attempt to ascertain the intent of Congress, as commanded by this Court in the *Sierra Club* case:

> ". . . [W]here, however, Congress has authorized public officials to perform certain functions according to law, and has provided by statute for judicial review of those actions under certain circumstances, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the Plaintiff."

Sierra Club, supra, 92 S. Ct. at 1364. The command that the intent of Congress be determined through a review of the legislative history of the statute in question, is hardly fulfilled by the single, unsupported statement by the Court of Appeals that:

> "Patently the statute protects not only the Government's interest in securing advantageous contracts, but also the interests of those responding to the Government's invitation to do business with it."

476 F.2d at 1242.

Furthermore, it must be remembered that here the Court of Appeals was mistakenly interpreting a Statute having no relevance to the offers to negotiate submitted by both the Plaintiff and Gateway Center Corporation. Indeed, in a case involving a negotiated procurement, the Court of Appeals for the District of Columbia Circuit stated that:

> ". . . [t]he legislative history . . . indicates that Congress intended to prevent review of determinations to negotiate . . . by either the Comptroller General or the Courts."

Wheelabrator Corporation, *supra* at 1311. See also *Edelman v. Federal Housing Administration*, *supra* at 597; *Allen M. Campbell Co., General Contractor, Inc.*, *supra* at 265. *Cf. Keco Industries*, *supra* at 1236.

After having reviewed the relevant legislative history in another government negotiation case, the Court stated that:

> ". . . [t]here is still no evidence of a Congressional desire to depart from this long-standing view that the fundamental Government procurement statutes . . . were designed *not* to protect bidders but rather to protect the Government."

Gary Aircraft Corporation, 342 F. Supp. 473, 477 (W.D. Tex. 1972).

In light of such statements by courts which have examined the legislative history of the applicable negotiation statutes, the words of Circuit Judge Adams, who dissented from the denial of Defendants' Petition for a Rehearing, assume special import:

> ". . . [t]he panel states, and indeed holds that Congress did intend for a private party, allegedly aggrieved by the action of GSA, to be heard by a federal district court. What concerns me about such

> conclusion is that it is little more than just that—a conclusion not shown to be based, at least so far as the opinion reveals, upon the underlying purposes or legislative history of the statute. In order to draw the inference that Congress intended for this kind of case to be heard by a federal court, I believe something more must be developed than the mere fact that the statute prohibits what the agency has allegedly done. What the panel has said still does not adequately answer the question whether Congress intended to protect those, who like the plaintiff, are disappointed in not receiving a government contract, and to provide them with a private right of action in the district court."

476 F.2d at 1249.

It is clear that the Court of Appeals for the Third Circuit has not only granted standing where prohibited by this Court's decision in *Perkins*, but it has done so without the inquiry, demanded by the *Sierra Club* opinion, into the intent of Congress and the legislative history of the Statute in question. The Petitioner therefore prays this Court to grant the writ of certiorari and to review the decision of the Court of Appeals for the Third Circuit.

B. Unsuccessful offerors, who fail to negotiate a contract with the Government, are accorded standing to sue in the Third Circuit, but not in the District of Columbia Circuit.

In 1970, the Court of Appeals for the District of Columbia Circuit rendered its precedent-setting opinion in *Scanwell Laboratories, Inc. v. Shaffer*, where it granted an unsuccessful bidder standing to contest the award of an advertised contract. 424 F.2d 859. It should be noted that the Court of Appeals went out of its way, in *Scanwell*,

to distinguish its earlier holding in *Friend v. Lee*, 221 F.2d 96 (D.C. Cir. 1955), a case in which the unsuccessful offeror was denied standing to contest the award of a negotiated contract. In footnote 10 in *Scanwell*, the Court specifically stated that:

> "[t]his somewhat lengthy recital of the *Friend* opinion is necessary to demonstrate the marked difference between that case and the present one."

424 F.2d at 868.

And, indeed, the two cases were different. The *Friend* case, which set forth the rule of standing for cases involving negotiated contracts, has never been overruled and still constitutes binding precedent in that Circuit. It is, of course, true that in later cases, the Court of Appeals for the District of Columbia has cited the *Scanwell* decision in support of a grant of standing in all cases where an unsuccessful businessman wishes to sue to contest the award of a contract, so long as he alleges sufficient facts to make out a prima facie case of either an illegal award, or one which was arbitrary or capricious. See *Wheelabrator, supra* at 1309. However, this reasoning fails, since the Plaintiff in *Friend* asserted the illegality of that negotiated contract throughout those proceedings. 221 F.2d at 100.

The fact remains, however, that the District of Columbia Circuit has refused to overrule *Friend*, both in *Scanwell* and in its later decisions. See e.g., *Constructores Civiles de Centroamerica, supra; M. Steinthal & Co. v. Seamans, supra; Wheelabrator, supra; Blackhawk Heating & Plumbing Co., supra; Ballerina Pen Co., supra.* The sole distinction between the *Friend* case and *Scanwell* is that the former sets forth the rule of standing applicable to negotiated contracts, and the latter sets forth the rule for advertised contracts.

Under these precedents, the Plaintiff would therefore have been denied standing had he sued in the District of

Columbia. This action was, however, brought in Philadelphia, and the Plaintiff was accorded standing under the rule of the Third Circuit. In order to reconcile the reigning confusion in this area, and thus to obtain one rule of standing in the Federal Courts, the Petitioner prays this Court to grant the writ of certiorari and to review this case.

C. Since the Court of Appeals' decision has "opened the door" to lawsuits by unsuccessful offerors, lawsuits which often pose complex legal issues and which demand equitable relief, lawsuits which increase the burden on the courts and disrupt government procurement, its opinion raises an important federal issue which should be decided by this Court.

The holding of the Court of Appeals for the first time permits a disappointed offeror to have standing to challenge a contract negotiated pursuant to the provisions of 41 U.S.C. §252, a Statute specifically providing for the alternate route of negotiation as contrasted with the formal procedure of advertising for bids. Clearly this decision of the Court of Appeals for the Third Circuit opens the door to a whole new range of cases and presents them for consideration at a time when the Courts' resources are stretched so thin that delays render it difficult to do substantial justice to the claims of the litigants. Lawsuits of this type must necessarily have the effect of disrupting the government procurement process, and in fact they ignore the specific congressional intent of permitting agency negotiation in circumstances which the agency deems appropriate; this decision in effect renders 41 U.S.C., §252 meaningless and is tantamount to judicial negation of an act of Congress. These factors have led other courts, considering similar cases, to note the importance of the issue of standing:

> "Whether a frustrated bidder for a government contract has standing to sue, alleging illegality in the manner in which the contract was let, is a question of major importance and can be dealt with only on the basis of a thorough review of the laws of standing."

Scanwell Laboratories, Inc. v. Shaffer, *supra* at 862.

The courts which have considered lawsuits by both disappointed bidders and offerors have alike remarked on the disruptive effect of such lawsuits on the Government's procurement operations:

> "Like private individuals in businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases. Acting through its agents, as it must of necessity, the Government may, for the purpose of keeping its own house in order, lay down guideposts by which its agents are to proceed in the procurement of supplies, and which create duties to the Government alone. It has done so in the Public Contracts Act. That Act does not depart from but instead embodies the traditional principle of leaving purchases necessary to the operation of our Government to administration by the executive branch of Government, with adequate range of discretion free from vexations and dilatory restraints at the suits of prospective or potential sellers. It was not intended to be a bestowal of litigable rights upon those desirous of selling to the Government; it is a self-imposed restraint for violation of which the Government—but not private litigants—can complain."

Perkins, *supra*, 310 U.S. at 127. See also *Perkins*, *supra* 310 U.S. at 130, where Mr. Justice Black stated for this Court that "a like restraint applied to purchasing by pri-

vate business would be widely condemned as an intolerable business handicap."

Illustrative of the havoc wrought upon the federal system by such a cavalier approach is the deluge of cases swamping the District of Columbia docket following its decision in *Scanwell*. The District of Columbia Circuit took notice of the disastrous effect of its *Scanwell* decision when it stated that "the mere fact that a party has standing to sue does not entitle him to render uncertain for a prolonged period of time government contracts which are vital to the functions performed by the sovereign." *Blackhawk Heating & Plumbing Co., supra* at 1141; see also *M. Steinthall & Co., supra* at 1303.

Furthermore, the complexity of these cases is such that the burdens on the district courts, as well as the disruption of Government procurement, are exaggerated by the amount of time necessary to litigate such cases. See *M. Steinthal & Co., supra*. One district judge confronted with the difficulties involved in this type of action, denied standing and stated that:

> "The present case amply demonstrates why injunctive suits of this nature have not been countenanced traditionally, and should not be permitted here. The *Perkins* rule is neither obsolete nor legalistic, but is firmly rooted in meritorious practical considerations. Whether or not these considerations are still subsumed under the traditional standing doctrine, they should and, unless the Supreme Court overrules *Perkins*, must be respected.
>
> "The fallacy of the *Scanwell* line of decisions which initially opened the District of Columbia's courtroom doors to all disgruntled bidders trying to upset awards became evident to that circuit in less than two years of this type of litigation when it denied plaintiff relief in *Wheelabrator*."

Gary Aircraft Corporation, *supra* at 477-478; see also *Wheelabrator Corporation v. Chafee*, *supra* at 1311-1312.

The severe burden imposed on the courts by this type of action, and the consequent disruption of the procurement process, were likewise noted by Circuit Judge Adams, who therefore considered this case significant:

> "During the last few years the federal courts have experienced an extraordinary increase in volume far more than what ought to have been expected from population growth alone. As Chief Judge Friendly has recently indicated . . . it may be that, if federal courts are to handle best the tasks most appropriately given them a solution must be sought not by creating more judgeships, but by slowing up judicial intake and certainly not by staking out additional areas of jurisdiction without very careful consideration."

476 F.2d at 1250.

The fact that the decision of the Court of Appeals for the Third Circuit threatens to so severely burden the Courts, and furthermore to subject the government's procurement of facilities to similar delays and disruption, demonstrates that this case presents a federal issue of major importance. The fact that the Court of Appeals undertook to render an unprecedented extension of the Federal Law of Standing renders this case deserving of consideration by the Supreme Court, and the Petitioner therefore prays this Court to issue the writ of certiorari to the Court of Appeals for the Third Circuit.

D. The Plaintiff's contentions that Defendant violated both the 1971 Appropriations Act and the Public Buildings Act of 1972 are rendered moot by the fact that no money was expended for this project in 1971, and that the Public Buildings Act does not apply retroactively.

The Plaintiff complains that this contract is prohibited by the Independent Offices Appropriations Act for 1971[5], which requires congressional approval for the payment of rent in transactions where the Lessor is to construct a building at an estimated cost exceeding $200,000 and then leases space in that building to the Government. Although congressional approval was neither sought nor obtained, this contention is rendered moot by the fact that no money was expended by the government for the Gateway project until the commencement of rental payments following the execution of the Lease in November, 1972. Since the Independent Offices Appropriations Act for 1972[6] does not contain the prohibition found in the earlier acts, the government's payment of rent to Gateway Center Corporation cannot be said to violate any appropriations Act.

However, the Plaintiff complains further that this contract violates the Public Buildings Act Amendments of 1972, Pub. L. No. 92-313, 80 Stat. 217, 40 U.S.C. §606(a), and the Court of Appeals sustained this contention. 476 F.2d at 1243-1244. These amendments, which contain a prohibition similar to that in the Independent Offices Appropriations Act, went into effect on June 16, 1972, and they are said to prohibit the lease from Gateway Center Corporation to GSA, which was executed on November 1, 1972.

---

5. Independent Offices Appropriations Act, 1970; Pub. L. No. 91-556, 84 Stat. 1448.

6. Independent Offices Appropriations Act, 1971, Pub. L. No. 92-49, 85 Stat. 115.

This argument, however, ignores the fact that the Government's contract with Gateway Center Corporation entails more than the execution of the lease: the Government solicited offers to negotiate under 41 U.S.C. §252(c)-(10), 63 Stat. 393, precisely because the facilities it desired could not readily be obtained, and because it therefore wished to negotiate with various offerors in order that more suitable facilities might become available. The negotiations resulted in significant amendments to Gateway's offer after its submission on October 13, 1970, and before the GSA acceptance on February 18, 1971, and these changes were made at GSA's behest. When GSA accepted Gateway's offer, it is clear that the rights and obligations of the parties then became fixed, and these rights and obligations included the execution of a lease and the payment of rent under it: in the letter accepting Gateway's offer, Arthur Sampson, Commissioner of the GSA Public Building Service stated that:

> "In accordance with the provisions of the Federal Property and Administrative Services Act of 1949, as amended, and Executive Order 11512, *I hereby accept your offer* of October 12, 1970, as amended by Amendment to offer of Gateway Centre [sic] Corporation dated January 12, 1971, and Second Amendment to offer of Gateway Centre [sic] Corporation, dated January 18, 1971, *to lease to the United States . . . Rental will be paid* at the rate of $2,316,000 per annum for a term of twenty years commencing 60 days after occupancy by the Government." [Emphasis added.]

Mr. Sampson's language indicates that the execution of the Lease was nothing more than a ministerial Act. This letter furthermore demonstrates that the contract between GSA and the Gateway Center Corporation was entered into on February 18, 1971, more than sixteen months before the Public Buildings Act Amendments

became effective. The holding of the Court of Appeals, that this 1972 statute applies to the Government's 1971 contract with Gateway Center Corporation, clearly impairs Gateway's rights under that contract and therefore constitutes an uncompensated taking of Gateway's property rights in violation of the Fifth Amendment to the United States Constitution. *Twenty Percent Cases*, 20 Wall 179, 22 L. Ed. 339 (1874); *United States v. St. Louis, San Francisco & Texas Railway Co.*, 270 U.S. 1, 46 S. Ct. 182, 70 L. Ed. 435 (1925).

Moreover, the decision of the Court of Appeals to apply these amendments retroactively also violates the established principle of statutory construction that a statute should not be applied retroactively unless the language is so clear as not to admit of any other construction. *City Railway Co. v. Citizens' Street Railroad Co.*, 166 U.S. 557, 17 S. Ct. 653, 41 L. Ed. 1114 (1897). It should be noted that the decision of the Court of Appeals contradicts a General Accounting Office (GAO) ruling that these Amendments should only be applied prospectively. Decision of the Comptroller General B-171958, January 19, 1973. Since the GAO is an agency of Congress (*Wheelabrator Corporation, supra* at 1313-1314; *M. Steinthal & Co., supra* at 1304-1305), its rulings on Congressional intent are entitled to great weight. The Petitioner therefore prays this Court to grant the writ of certiorari and to review the decision of the Court of Appeals.

CONCLUSION

The issues posed by this case are of a nature requiring decision by the Supreme Court. The principles of standing announced in this Court's recent decisions require further amplification, and this can be supplied only upon Supreme Court review: the District of Columbia Circuit and the Third Circuit are already applying different rules to unsuccessful offerors, who fail to obtain negotiated contracts with the government. Moreover, this Court is asked to review a Court of Appeals decision, which directly contravenes an earlier Supreme Court decision, and the importance of the issue is not lessened by the major burdens imposed on the courts, and the disruption of government procurement engendered by the ruling of the Court of Appeals. This disruption is furthered by the Court's decision to apply the Public Buildings Act Amendments retroactively in defiance of the intent of Congress and in violation of the Fifth Amendment to the Constitution. These issues assume major importance due to burdens imposed upon both courts and the executive branch of the government by this decision, and the Petitioner therefore requests this Court to grant this writ of certiorari to the United States Court of Appeals for the Third Circuit and to consider the issues raised herein.

Respectfully submitted,

DAVID F. MAXWELL
Attorney for Petitioner,
Gateway Center
Corporation

Of Counsel

OBERMAYER, REBMANN, MAXWELL & HIPPEL
14th Floor Packard Building
Philadelphia, Pennsylvania 19102

Supreme Court, U. S.
FILED
JUL 26 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

73-180

GATEWAY CENTER CORPORATION,
Petitioner

and

ROBERT L. KUNZIG, Administrator, General Services Administration, A. J. SAMPSON, Commissioner, Public Building Service of the General Services Administration, L. M. SHIPP, JR., Assistant Commissioner, Space Management of the General Services Administration and the GENERAL SERVICES ADMINISTRATION of the United States of America,

v.

JOHN W. MERRIAM, *Respondent*

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

DAVID F. MAXWELL
Attorney for Petitioner,
Gateway Center Corporation

Of Counsel:
OBERMAYER, REBMANN, MAXWELL & HIPPEL
14th Floor
Packard Building
Philadelphia, Pennsylvania 19102

THE LEGAL INTELLIGENCER, 99 SOUTH JUNIPER STREET, PHILA., PA. 19107

INDEX TO APPENDIX

Page

APPENDIX I

United States Constitution, Amendment V 1a

Federal Property and Administrative Services Act of 1949, 41 U.S.C. §253 ..... 1a

Federal Property and Administrative Services Act of 1949, 41 U.S.C. §252 ..... 2a

Section 10, Administrative Procedure Act 4a

Executive Order No. 11512 ..... 4a

Federal Procurement Regulation 1-3.805-1 ..... 7a

Independent Offices Appropriations Act for 1971 .... 10a

Independent Offices Appropriations Act for 1972 .... 13a

Public Buildings Act Amendments of 1972 ..... 16a

APPENDIX II

Letter of the Comptroller General, September 16, 1971, Decision B-171958 ..... 19a

Letter of the Comptroller General, March 17, 1972, Decision B-171958 ..... 22a

Opinion of the United States District Court for the Eastern District of Pennsylvania, June 26, 1972 ..... 36a

Opinion of the United States Court of Appeals for the Third Circuit, February 16, 1973 ..... 66a

Order Amending Opinion, United States Court of Appeals for the Third Circuit, April 13, 1973 . 85a

Opinion on Petition for Rehearing, United States Court of Appeals for the Third Circuit, April 27, 1973 ..... 87a

APPENDIX II—*(Continued)* Page

Order of United States District Court for the Eastern District of Pennsylvania Permitting Intervention of Gateway Center Corporation as Defendant, June 29, 1973 ..... 100a

APPENDIX III

Solicitation for Offers No. NEG(70)-63, September 30, 1970 ..... 101a

APPENDIX I

CONSTITUTIONAL PROVISIONS, STATUTES AND EXECUTIVE ORDERS

UNITED STATES CONSTITUTION, AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * *

FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949, as amended, June 30, 1949, c. 288, Title III, §303, 63 Stat. 395; July 12, 1952, c. 703, §1(m), 66 Stat. 594; as amended Mar. 16, 1968, Pub. L. No. 90-268, §2, 82 Stat. 49, 41 U.S.C. §253.

§253. *Advertising requirements*

Whenever advertising is required—

(a) The advertisement for bids shall be made a sufficient time previous to the purchase or contract, and specifications and invitations for bids shall permit such full and free competition as is consistent with the procurement of types of property and services necessary to meet the requirements of the agency concerned. No advertisement or invitation to bid for the carriage of Government property in other than Government-owned cargo

containers shall specify carriage of such property in cargo containers of any stated length, height, or width.

(b) All bids shall be publicly opened at the time and place stated in the advertisement. Award shall be made with reasonable promptness by written notice to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered: *Provided*, That all bids may be rejected when the agency head determines that it is in the public interest so to do.

FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949, as amended, June 30, 1949, c. 288, Title II, §302, 63 Stat. 393; as amended Nov. 8, 1965, Pub. L. No. 89-343, §§1, 2, 79 Stat. 1303; Nov. 8, 1965, Pub. L. No. 89-348, §1(2), 79 Stat. 1310; Mar. 16, 1968, Pub. L. No. 90-268, §4, 82 Stat. 50, 41 U.S.C. §252.

§252. *Purchases and contracts for property—applicability of chapter; delegation of authority*

Negotiated purchases and contracts for property; conditions

(c) All purchases and contracts for property and services shall be made by advertising, as provided in section 253 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if—

(1) determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress;

(2) the public exigency will not admit of the delay incident to advertising;

(3) the aggregate amount involved does not exceed $2,500;

(4) for personal or professional services;

(5) for any service to be rendered by any university, college, or other educational institution.

(6) the property or services are to be procured and used outside the limits of the United States and its possessions;

(7) for medicines or medical property;

(8) for property purchased for authorized resale;

(9) for perishable or nonperishable subsistence supplies;

(10) for property or services for which it is impracticable to secure competition;

(11) the agency head determines that the purchase or contract is for experimental, developmental, or research work, or for the manufacture or furnishing of property for experimentation, development, research, or test;

(12) for property or services as to which the agency head determines that the character, ingredients, or components thereof are such that the purchase or contract should not be publicly disclosed;

(13) for equipment which the agency head determines to be technical equipment, and as to which he determines that the procurement thereof without advertising is necessary in special situations or in particular localities in order to assure standardization of equipment and interchangeability of parts and that such standardization and interchangeability is necessary in the public interest;

(14) for property or services as to which the agency head determines that bid prices after advertising therefor are not reasonable (either as to all or as to some part of the requirements) or have not been independently arrived at in open competition: *Provided*, That no negotiated purchase or contract may be entered into under this paragraph after the rejection of all or some of the bids received unless (A) notification of the intention to negotiate and reasonable opportunity to negotiate shall have been given by the agency head to each responsible bidder and (B) the negotiated price is the lowest negotiated price offered by any responsible supplier; or

(15) otherwise authorized by law, except that section 254 of this title shall apply to purchases and contracts made without advertising under this paragraph.

ADMINISTRATIVE PROCEDURE ACT §10. Pub. L. No. 89-554, Sept. 6, 1966, 80 Stat. 392, 5 U.S.C. §702.

§702. *Right of review*

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

EXECUTIVE ORDER No. 11512, 35 Fed. Reg. 3979

PLANNING, ACQUISITION, AND MANAGEMENT OF FEDERAL SPACE

By virtue of the authority vested in me by the Federal Property and Administrative Services Act of 1949, as amended [F.C.A. 40 §§471 and notes—475, 481, 483, 484, 485-492, 511-514, 521-524, 531 and note—535, 751-759; 41 §§5, 251-254, 255, 257-260; 44 §2901 et seq.], and as President of the United States, it is hereby ordered as follows:

Section 1. The Administrator of General Services (hereinafter termed "the Administrator") shall initiate and maintain plans and programs for the effective and efficient acquisition and utilization of federally owned and leased space located in the States of the United States or in the District of Columbia or in Puerto Rico (hereinafter termed "in the United States"), and for which the Administrator is responsible. The Administrator shall prepare and issue standards and criteria for the use of such space and shall periodically undertake surveys of space requirements and space utilization in the executive agencies and initiate actions and formulate programs to meet the essential space requirements of executive agencies. In carrying out

these functions, the Administrator shall (a) coordinate proposed programs and plans for buildings and space with the Bureau of the Budget, (b) obtain from the Civil Service Commission, the Office of Emergency Preparedness, and the Department of Defense any information in the possession of those agencies which may bear upon such programs and plans, (c) coordinate proposed programs and plans for buildings and space in a manner designed to exert a positive economic and social influence on the development or redevelopment of the areas in which such facilities will be located, (d) seek the cooperation of the heads of the executive agencies concerned with any of the foregoing, and (e) annually submit long-range plans and programs for the acquisition, modernization, and use of space for approval by the President.

Sec. 2. (a) The Administrator, and the heads of executive agencies, shall be guided by the following policies for the acquisition, assignment, reassignment, and utilization of office buildings in the United States:

(1) Material consideration shall be given to the efficient performance of the missions and programs of the executive agencies and the nature and function of the facilities involved, with due regard for the convenience of the public served and the maintenance and improvement of safe and healthful working conditions for employees;

(2) Consideration shall be given in the selection of sites for Federal facilities to the need for development and redevelopment of areas and the development of new communities, and the impact a selection will have on improving social and economic conditions in the area. In determining these conditions the Administrator shall consult with and receive advice from the Secretary of Housing and Urban Development, the Secretary of Health, Education, and Welfare, the Secretary of Commerce, and others, as appropriate;

(3) Maximum use shall be made of existing Government-owned permanent buildings which are adequate or

economically adaptable to the space needs of executive agencies;

(4) Suitable privately owned space shall be acquired only when satisfactory Government-owned space is not available, and only at rental charges which are consistent with prevailing rates in the community for comparable facilities;

(5) Space planning and assignments shall take into account the objective of consolidating agencies and constituent parts thereof in common or adjacent space for the purpose of improving management and administration;

(6) The availability of adequate low and moderate income housing, adequate access from other areas of the urban center, and adequacy of parking will be considered; and

(7) Proposed developments shall be, to the greatest extent practicable, consistent with State, regional, and local plans and programs; and Governors, local elected officials, and regional comprehensive planning agencies shall be consulted in the planning of such developments.

(b) The Administrator shall plan, acquire, and manage space in the United States upon his determination that such actions will serve to improve the management and administration of governmental activities and services, and will foster the programs and policies of the Federal Government. Prior to making such determinations, the Administrator shall consult with the heads of the executive agencies concerned and take into account their requirements, consistent with the criteria stated here and his other responsibilities. The Administrator shall advise the agency head in writing of his intended course of action and notify him that in the event of disagreement the affected agency head may within thirty days make a written request for review of the matter, through the Director of the Bureau of the Budget, to the President.

Sec. 3. The heads of executive agencies shall (a) cooperate with and assist the Administrator in carrying out his responsibilities respecting buildings and space. (b) take measures to give the Administrator early notice of new or changing space requirements, (c) seek to economize in their requirements for space, and (d) review continuously their needs for space in and near the District of Columbia, taking into account the feasibility of decentralizing services or activities which can be carried on elsewhere without excessive costs or significant loss of efficiency.

Sec. 4. The provisions of this order shall be subject to applicable provisions of law (including applicable provisions of any reorganization plan).

Sec. 5. Executive Order No. 11035 of July 9, 1962 [1962 Public Laws and Administrative Material, p. B116], is hereby superseded.

Richard Nixon
February 27, 1970.

[F. R. Doc. 70-2649; Filed, Feb. 27, 1970; 4:45 p.m.]

FEDERAL PROCUREMENT REGULATION 1-3.805-1, 41 C.F.R. §1-3.805-1.

§1-3.805 *Selection of offerors for negotiation and award*

§1-3.805-1 *General*

The procedures set forth in this §1-3.805-1 are generally applicable to negotiated procurement. However, they are not applicable where their use would be inappropriate, as may be the case, for example, when procuring research and development or special services (such as architect-engineer services) or when cost-reimbursement type contracting is anticipated (see §1-3.805-2). While the lowest price or lowest cost to the Government is properly the deciding factor in source selection in many in-

stances, award of a contract properly may be influenced by the proposal which promises the greatest value to the Government in terms of possible performance, ultimate producibility, growth potential, and other factors.

(a) After receipt of initial proposals, written or oral discussions shall be conducted with all responsible offerors who submitted proposals within a competitive range, price and other factors considered, except that this requirement need not necessarily be applied to:

(1) Procurements not in excess of $2,500;

(2) Procurements in which rates or prices are fixed by law or regulations;

(3) Procurements in which time of delivery will not permit such discussions;

(4) Procurements of the set-aside portion of partial set-asides or by small business restricted advertising; or

(5) Procurements in which it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the product or service that acceptance of the most favorable initial proposal without discussion would result in a fair and reasonable price: *Provided*, That the request for proposals contains a notice to all offerors of the possibility that award may be made without discussion of proposals received and, hence, that proposals should be submitted initially on the most favorable terms, from a price and technical standpoint, which the offeror can submit to the Government. In any case where there is uncertainty as to the pricing or technical aspects of any proposals, the contracting officer shall not make award without further exploration and discussion prior to award. Also, when the proposal most advantageous to the Government involves a material departure from the stated requirements, consideration shall

be given to offering the other firms which submitted proposals an opportunity to submit new proposals on a technical basis which is comparable to that of the most advantageous proposal: *Provided*, That this can be done without revealing to the other firms any information which the offeror does not want disclosed to the public (see §1-3.103(b)).

(b) Whenever negotiations are conducted with more than one offeror, no indication shall be given to any offeror of a price which must be met to obtain further consideration since such practice constitutes an auction technique which must be avoided. Likewise, no offeror shall be advised of his relative standing with other offerors as to price or be furnished information as to the prices offered by other offerors. After receipt of proposals, no information regarding the number of identity of the offerors participating in the negotiations shall be made available to the public or to any one whose official duties do not require such knowledge. Whenever negotiations are conducted with several offerors, while such negotiations may be conducted successively, all offerors selected to participate in such negotiations (see §1-3.805-1(a)) shall be offered an equitable opportunity to submit such price, technical, or other revisions in their proposals as may result from the negotiations. All such offerors shall be informed of the specified date (and time if desired) of the closing of negotiations and that any revisions to their proposals should be submitted by that date. In addition, all such offerors shall be informed that after the specified date for the closing of negotiations, no information (other than pre-award notice of unacceptable proposals or offers) will be furnished to any offeror until award has been made. For the requirements and limitations concerning the furnishing of information after awards have been made, see §1-3.103.

(c) Except where cost-reimbursement type contracts are to be used (see §1-3.805-2), a request for proposals may provide that after receipt of initial technical proposals, such proposals will be evaluated to determine those which are acceptable to the Government or which, after discussion, can be made acceptable, and upon submission of prices thereafter, award shall be made to that offeror of an acceptable proposal who is the low responsible offeror.

(d) When, during negotiations, a substantial change occurs in the Government's requirements or a decision is reached to relax, increase, or otherwise modify the scope of the work or statement of requirements, such change or modification shall be made in writing as an amendment to the request for proposals, and a copy shall be furnished to each prospective contractor. Oral advice of change or modification may be given if (1) the changes involved are not complex in nature, (2) all prospective contractors are notified simultaneously (preferably by a meeting with the contracting officer), and (3) a record is made of the oral advice given. In such instances, however, the oral advice should be promptly followed by a written amendment verifying such oral advice previously given. The dissemination of oral advice of changes or modifications separately to each prospective contractor during individual negotiation sessions should be avoided unless preceded, accompanied, or immediately followed by a written amendment to the request for proposals embodying such changes or modifications.

INDEPENDENT OFFICES APPROPRIATIONS ACT, Dec. 17, 1970, Pub. L. 91-556, 84 Stat. 1448.

GENERAL PROVISIONS

The appropriate appropriation or fund available to the General Services Administration shall be credited

with (1) cost of operation, protection, maintenance, upkeep, repair, and improvement, included as part of rentals received from Government corporations pursuant to law (40 U.S.C. 129); (2) reimbursements for services performed in respect to bonds and other obligations under the jurisdiction of the General Services Administration, issued by public authorities, States, or other public bodies, and such services in respect to such bonds or obligations as the Administrator deems necessary and in the public interest may, upon the request and at the expense of the issuing agencies, be provided from the appropriate foregoing appropriation; and (3) appropriations or funds available to other agencies, and transferred to the General Services Administration, in connection with property transferred to the General Services Administration pursuant to the Act of July 2, 1948 (50 U.S.C. 451ff), and such appropriations or funds may be so transferred, with the approval of the Bureau of the Budget.

Appropriations to the General Services Administration under the heading "Construction, Public Building Projects" shall be available, subject to the provisions of the Public Buildings Act of 1959 for (1) acquisition of buildings and sites thereof by purchase, condemnation, or otherwise, including prepayment of purchase contracts, (2) extension or conversion of Government-owned buildings, and (3) construction of new buildings, in addition to those set forth under that appropriation: *Provided*, That nothing herein shall authorize an expenditure of funds for acquisition, extension or conversion, or construction without the approval of the Committees on Appropriations of the Senate and House of Representatives.

Funds available to the General Services Administration shall be available for the hire of passenger motor vehicles.

No part of any money appropriated by this or any other Act for any agency of the executive branch of the Government shall be used during the current fiscal year for the purchase within the continental limits of the

United States of any typewriting machines except in accordance with regulations issued pursuant to the provisions of the Federal Property and Administrative Services Act of 1949, as amended.

Not to exceed 2 per centum of any appropriation made available to the General Services Administration for the current fiscal year by this Act may be transferred to any other such appropriation, but no such appropriation shall be increased thereby more than 2 per centum: *Provided*, That such transfers shall apply only to operating expenses, and shall not exceed in the aggregate the amount of $2,000,000.

Appropriations available to any department or agency during the current fiscal year for necessary expenses, including maintenance or operating expenses, shall also be available for (a) reimbursement to the General Services Administration for those expenses of renovation and alteration of buildings and facilities which constitute public improvements, performed in accordance with the Public Buildings Act of 1959 (73 Stat. 479) or other applicable law, and (b) transfer or reimbursement to applicable appropriations to said Administration for rents and related expenses, not otherwise provided for, of providing subject to Executive Order 11035, dated July 9, 1962, directly or indirectly, suitable general purpose space for any such department or agency, in the District of Columbia or elsewhere.

No part of any appropriation contained in this Act shall be used for the payment of rental o[illegible] agreements for the accommodation of Federal agencies in buildings and improvements which are to be erected by the lessor for such agencies at an estimated cost of construction in excess of $200,000 or for the payment of the salary of any person who executes such a lease agreement: *Provided*, That the foregoing proviso shall not be applicable to projects for which a prospectus for the lease construction of space has been submitted to the Congress and approval made in the same manner as for the public buildings construction projects pursuant to the Public Buildings Act of 1959.

INDEPENDENT OFFICES APPROPRIATIONS ACT, July 9, 1971, Pub. L. 92-49, 85 Stat. 115.

General Services Administration

Public Buildings Service

Operating Expenses

For necessary expenses, not otherwise provided for, of real property management and related activities as provided by law; rental of buildings in the District of Columbia; restoration of leased premises; moving Government agencies (including space adjustments) in connection with the assignment, allocation, and transfer of building space; acquisition by purchase or otherwise of real estate and interests therein; and contractual services incident to cleaning or servicing buildings and moving; $406,000,000: *Provided*, That this appropriation shall be available to provide such fencing, lighting, guard booths, and other facilities on private or other property not in Government ownership or control as may be appropriate to enable the United States Secret Service to perform its protective functions pursuant to title 18, U.S.C. 3056: *Provided further*, That this appropriation and the "Buildings Management Fund" (40 U.S.C. 490(f)), shall be available for employment of guards for all buildings and areas owned or occupied by the United States and under the charge and control of the General Services Administration or the Post Office Department (or the Postal Service), and such guards shall have, with respect to such property, the powers of special policemen provided by the first section of the Act of June 1, 1948 (62 Stat. 281; 40 U.S.C. 318), but shall not be restricted to certain Federal property as otherwise required by the proviso contained in said section.

Repair and Improvement of Public Buildings

For expenses, not otherwise provided for, necessary to alter public buildings and to acquire additions to sites

pursuant to the Public Buildings Act of 1959, as amended (40 U.S.C. 601-615), and to alter other federally owned buildings and to acquire additions to sites thereof, including grounds, approaches and appurtenances, wharves and piers, together with the necessary dredging adjacent thereto; and care and safeguarding of sites; preliminary planning of projects by contract or otherwise; maintenance, preservation, demolition, and equipment; $92,000,000, to remain available until expended: *Provided*, That for the purposes of this appropriation, buildings constructed pursuant to the Public Buildings Purchase Contract Act of 1954 (40 U.S.C. 356) and buildings under the control of another department or agency where alteration of such buildings is required in connection with the moving of such other department or agency from buildings then, or thereafter to be, under the control of General Services Administration shall be considered to be public buildings.

Construction, Public Building Projects

For an additional amount for expenses, not otherwise provided for, necessary to construct and acquire public buildings projects and alter public buildings by extension or conversion where the estimated cost for a project is in excess of $200,000, pursuant to the Public Buildings Act of 1959, as amended (40 U.S.C. 601-615), including fallout shelters and equipment for such buildings, $200,440,000, and not to exceed $500,000 of this amount shall be available to the Administrator for construction or alteration of small public buildings outside the District of Columbia as the Administrator approves and deems necessary, all to remain available until expended: *Provided*, That the foregoing amount shall be available for public buildings projects at locations and at maximum construction improvement costs (excluding funds for sites and expenses), as follows:

Federal office building, Mobile, Alabama, $8,339,000:

Courthouse and Federal office building, Fayetteville, Arkansas, $2,067,000;

Border station, Calexico, California, $5,122,000;

Federal correctional center and parking facility, Chicago, Illinois, $4,281,000;

Post office, courthouse and Federal office building, Aberdeen, Mississippi, $2,249,000;

Post office, courthouse and Federal office building, Oxford, Mississippi, $3,248,000;

Border station, Champlain, New York, $6,116,000;

Foley Square Courthouse annex, New York, New York, $10,700,000;

Post office and Federal office building, Mansfield, Ohio, $6,117,000;

Border patrol sector headquarters, McAllen, Texas, $1,193,000;

Post office, courthouse and Federal office building, Midland, Texas, $4,925,000;

Post office, courthouse, and Federal office building, Elkins, West Virginia, $2,454,000;

Federal office building (superstructure), Seattle, Washington, $35,004,000;

Department of Labor building (superstructure), District of Columbia, $67,167,000; and

Federal office building (superstructure), South Portal, District of Columbia, $40,958,000: *Provided further*, That the foregoing limits of costs may be exceeded to the extent that savings are effected in other projects, but by not to exceed 10 per centum.

Sites and Expenses, Public Buildings Projects

For an additional amount for expenses necessary in connection with the construction of public buildings projects not otherwise provided for, including preliminary planning by contract or otherwise, $17,749,500, to remain available until expended: *Provided*, That the $4,209,000

appropriated under the heading "Sites and Expenses, Public Buildings Projects", in the Second Supplemental Appropriation Act, 1971, Public Law 92-18, shall also remain available until expended.

Payments, Public Buildings Purchase Contracts

For payments of principal, interest, taxes, and any other obligations under contracts entered into pursuant to the Public Buildings Purchase Contract Act of 1954 (40 U.S.C. 356), $2,400,000.

Expenses, United States Court Facilities

For necessary expenses, not otherwise provided for, to provide directly or indirectly, additional space for the United States Courts incident to expansion of facilities (including rental of buildings in the District of Columbia and elsewhere and moving and space adjustments), and furniture and furnishings, $2,780,000.

PUBLIC BUILDINGS ACT AMENDMENTS OF 1972, Pub. L. 92-313, §2(4), June 16, 1972, 86 Stat. 217, 40 U.S.C. §606.

§606. *Approval of proposed projects by Congress—Limitation of funds; transmission to Congress of prospectus of proposed project.*

(a) In order to insure the equitable distribution of public buildings throughout the United States with due regard for the comparative urgency of need for such buildings, except as provided in section 603 of this title, no appropriation shall be made to construct, alter, purchase, or to acquire any building to be used as a public building which involves a total expenditure in excess of $500,000 if such construction, alteration, purchase, or acquisition has not been approved by resolutions adopted by the Com-

mittee on Public Works of the Senate and House of Representatives, respectively. No appropriation shall be made to lease any space at an average annual rental in excess of $500,000 for use for public purposes if such lease has not been approved by resolutions adopted by the Committee on Public Works of the Senate and House of Representatives, respectively. For the purpose of securing consideration for such approval, the Administrator shall transmit to the Congress a prospectus of the proposed facility, including (but not limited to)—

(1) a brief description of the building to be constructed, altered, purchased, acquired, or the space to be leased under this chapter;

(2) the location of the building or space to be leased and an estimate of the maximum cost to the United States of the facility to be constructed, altered, purchased, acquired, or the space to be leased;

(3) a comprehensive plan for providing space for all Government officers and employees in the locality of the proposed facility or the space to be leased, having due regard for suitable space which may continue to be available in existing Government-owned or occupied buildings;

(4) with respect to any project for the construction, alteration, purchase, or acquisition of any building, a statement by the Administrator that suitable space owned by the Government is not available and that suitable rental space is not available at a price commensurate with that to be afforded through the proposed action; and

(5) a statement of rents and other housing costs currently being paid by the Government for Federal agencies to be housed in the building to be constructed, altered, purchased, acquired, or the space to be leased.

Increase of estimated maximum cost

(b) The estimated maximum cost of any project approved under this section as set forth in any prospectus may be increased by an amount equal to the percentage increase, if any, as determined by the Administrator, in construction or alteration costs, as the case may be, from the date of transmittal of such prospectus to Congress, but in no event shall the increase authorized by this subsection exceed 10 per centum of such estimated maximum cost.

Rescission of approval for failure to make appropriations for project

(c) In the case of any project approved for construction, alteration, or acquisition by the Committees on Public Works of the Senate and of the House of Representatives, respectively, in accordance with subsection (a) of this section, for which an appropriation has not been made within one year after the date of such approval, either the Committee on Public Works of the Senate or the Committee on Public Works of the House of Representatives, may rescind, by resolution, its approval of such project at any time thereafter before such an appropriation has been made.

Emergency leases by the Administrator

(d) Nothing in this section shall be construed to prevent the Administrator from entering into emergency leases during any period declared by the President to require such emergency leasing authority, except that no such emergency lease shall be for a period of more than 180 days without approval of a prospectus for such lease in accordance with subsection (a) of this section.

APPENDIX II

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20643

B-171958 September 16, 1971

Dear Mr. Kunzig:

We refer to letters, with enclosures, dated April 12 and July 9, 1971, from the General Counsel, furnishing our Office a report on the protest of Richard B. Herman and Company against the negotiation of a lease by the General Services Administration with Gateway Center Corporation under solicitation for offers No. NEG(70)-63

Enclosed is a copy of our letter of today to counsel for the protestant, declining to rule on the matter at this time.

Sincerely yours,

Acting Comptroller General
of the United States

Enclosure

The Honorable Robert L. Kunzig
Administrator, General Services
Administration

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20343

September 16, 1971

Lankler and Parker
Waterhouse
3526 Street, N.W. (Water Street)
Washington, D.C. 20007

Attention: Douglas H. Parker, Esq.

Gentlemen:

We refer to your submission received here on August 27, 1971, and prior correspondence, on behalf of Richard B. Herman and Company, agent for Mr. John W. Merriam, questioning the negotiation of a lease by the General Services Administration (GSA) with Gateway Center Corporation under solicitation for offers No. (70)-63. Question is raised primarily on the ground that Gateway did not meet the criteria established by GSA for the purpose of assuring compliance with the limitation in the Independent Offices Appropriation Act of 1970 (Public Law 91-556), which, in effect, precludes the lease of new construction unless such construction has already been committed as a private venture.

We have reviewed the arguments in support of your position that the award to Gateway should be canceled. Though there may be merit in your argument that Gateway did not fully meet one or more of the five criteria adopted by GSA to establish compliance with the appropriation limitation, we feel that we cannot rule authoritatively on the protest at this time.

We are concluding a review of GSA's lease construction practices, with particular emphasis on its implementation of the appropriation limitation, including the efficacy of the criteria prescribed by GSA for assuring compliance.

This case is being considered in the review. From the standpoint of the appropriation limitation, the basic and underlying question is whether an offeror actually intends to construct a building irrespective of a lease with GSA. This question cannot be resolved without considering the impact of GSA's practices on the response of a particular offeror. In this connection, we cannot ignore the fact that in reliance on GSA's determination that there was compliance with the appropriation limitation as implemented by the five criteria, Gateway has made progress in construction of the building involved.

Upon completion of our review we will report our findings and conclusions to the Congress.

Very truly yours,

R. E. KELLER

Comptroller General
of the United States

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-171958 March 17, 1972

Dear Mr. Kreger:

By letter dated February 11, 1972, the Assistant Attorney General, Land and Natural Resources Division, Department of Justice, forwarded a copy of the court's order of February 7, 1972, staying action in the case of *John W. Merriam v. Kunzig, et al.*, United States District Court, Eastern District of Pennsylvania, Civil Action No. 71-2262, pending receipt of our decision on a protest covering the same subject matter initially filed with our Office by the plaintiff.

The matter presently before the court was initially brought to our attention by telegram of February 19, 1971, from Richard B. Herman and Company, agent for John W. Merriam (Merriam), which questioned generally the propriety of the negotiation of a lease by the General Services Administration (GSA), acting on behalf of the United States, with Gateway Center Corporation (Gateway) under solicitation for offers No. NEG(70)-63. By letter dated April 12, 1971, with enclosures, your General Counsel furnished our Office an administrative report outlining the circumstances involved. By letter with enclosures dated May 28, 1971, Lankler and Parker, counsel for Merriam for purposes of its protest before our Office, responded to the administrative report. As a result of counsel's reply, we requested a further report from GSA. By letter, with enclosures, dated July 9, 1971, we received a reply from your General Counsel and this supplemental report was made available to Merriam's counsel for comment. By letter received in our Office on July 22, 1971, counsel responded. Further submissions were also received from Merriam's counsel by letters dated August 25, 27 and September 10, 1971.

By letter dated September 16, 1971, we advised Merriam's counsel that we could not authoritatively rule at the time on the basic question presented by the protest, namely, whether Gateway met the criteria established by GSA for the purpose of assuring compliance with the limitation in the Independent Offices Appropriation Act of 1970 (Public Law 91-556), which, in effect, precludes the lease of new construction unless such construction has already been committed as a private venture. This action was taken in view of the fact that we were still in the process of reviewing GSA's lease construction practices, with particular emphasis on its implementation of the appropriation limitation. Merriam was advised, however, that we would consider the protest in the context of our report to the Congress. We were also cognizant of the fact that Merriam would institute court proceedings in the event of our declination to rule.

Our review is now complete and our report to the Congress will be released in the next few weeks. In view of the court's request for a specific ruling by our Office on the merits of Merriam's contention that the award to Gateway violates the Appropriation Act limitation and in consonance with the principles recently articulated in *The Wheelabrator Corporation v. Chafee, et al.*, — F. 2d — (D.C. Cir. Nos. 24,705 and 24,729, October 14, 1971), and *M. Steinthal & Co., Inc. v. Seamans, et al.*, — F.2d — (D.C. Cir. No. 24,595, October 14, 1971), we have considered the facts surrounding the Merriam protest independent of the report. In our view, two separate inquiries are involved. First, there is question as to the meaning and application of the Appropriation Act limitation and, second, there is question as to the impact of the five criteria on competitive aspects of the procurement, that is, the rights of contending offerors during the negotiation of a lease contract.

With respect to the first question, the statutory limitation on the use of appropriations for lease construction programs was first included in the Independent Offices Appro-

priations Act of 1963, Public Law 67-741, 76 Stat. 723. In explaining the proposed statutory limitation, the House Committee on Appropriations stated:

> "The General Services Administration wants to build several new buildings in the District of Columbia under a lease construction program to provide 1 million square feet of additional space. The entire space in each building is to be rented by the Government. With this procedure the Committee disagrees since they are completely financed new buildings under lease construction contracts. The Committee believes that the Government should own the buildings instead of giving somebody a ten to fifteen year payout.
>
> "The concern of the Committee is that lease construction is clearly the most expensive method of providing Government space. Under this method the Government * * * never obtains title to the property. A limitation on use of funds for lease construction projects costing over $200,000 has therefore been included in the bill * * *." H. Rept. No. 2050, 87th Cong., 2d sess., at page 13.

In presenting its views to Subcommittee on Independent Offices of the House Committee on Appropriations in connection with the 1964 appropriations, GSA requested deletion of the restrictive provision. GSA suggested that the limitation was inconsistent with the program it considered necessary to meet the office space requirements of the Government. In rejecting GSA's request, the chairman of the subcommittee stated:

> "I am afraid the GSA misinterpreted the language. The language was intended absolutely to forbid the leasing of that space under your jurisdiction, and requiring of you to come to the proper committees for authorization. Your language is quite weak. The reason you want this deleted is that you do not want to come back to Congress every year for your funds and

authorization. In that regard, you are no different from any other agency that wants back-door authority."

We believe the statutory limitation and its legislative history evidence a strong congressional policy against lease construction programs. Although this policy is directed primarily against GSA, as opposed to a particular class of prospective lessors, the basic thrust of any implementation of the Appropriation Act limitation in the case of new construction must be to assure that only construction already committed as a private venture is offered to the Government for rental. In our view, the underlying question which any administrative implementation of the limitation must seek to resolve is whether there is a bona fide intention on the part of the offeror to construct the building offered for lease irrespective of its securing a lease with GSA. If this is the basic question, as we believe it is, then the fact that an offered building is not actually in existence is not decisive.

The five criteria are designed to provide objective assurance that a particular offeror intends to go forward with his building irrespective of executing a lease with the Government—and this is their only purpose. The practical effect of meeting the criteria is to create a presumption overriding the appropriation restriction against leasing space to be created for the Government. Compliance must be judged on the basis of the circumstances existing at the time of issuance of the solicitation for offers.

As noted by GSA in its submissions to the court, discussions were held between representatives of our Office and GSA prior to GSA's determination to rely upon the five criteria. We did not object to use of the criteria because we could not say that their adoption and proper enforcement would not adequately insure compliance with the Appropriation Act limitation. We remain of that view.

A basic question, then, is whether there has been bona fide compliance with each of the five criteria in this case, and we turn to a consideration of the specific circumstances involved.

Solicitation NEG(70)-63 was issued on September 30, 1970, for the leasing of 314,000 net usable square feet of office, storage and related space to be ready for possession by July 1, 1972. The lease is to be for a period of 20 years beginning on the date the space is accepted for Government occupancy with the right reserved to the Government to renew the lease for two additional 5-year periods.

The subject solicitation contained the following provisions:

"12. *SPECIAL CONDITIONS RELATING TO BUILDING TO BE ERECTED BY BIDDER.*

"a. *Requirement.* Each year since 1963 the following provision has been included in the Independent Offices Appropriations Act:

> 'No part of any appropriation contained in this Act shall be used for the payment of rental on lease agreements for the accommodation of Federal agencies in buildings and improvements which are to be created by the lessor for such agencies at an estimated cost of construction in excess of $200,000 or for the payment of the salary of any person who executes such a lease agreement: Provided, That the foregoing proviso shall not be applicable to projects for which a prospectus for the lease construction of space has been submitted to the Congress and approval made in the same manner as for the public buildings construction projects pursuant to the Public Buildings Act of 1959.'

"b. *Buildings and Improvements to be Erected or Altered.* In the event a bidder offers (1) a new building to be erected, or (2) an existing building to be extended or added to (see c(2)(c), below) such bid shall remain open for acceptance by the Government for 120 days beyond the date for bid acceptance elsewhere specified in this solicitation, in order to afford the Government adequate time to prepare and submit to the appropriate Committees of Congress for

approval, the prospectus required by the Act quoted in a, above.

"c. *Definition of Existing Buildings, Extension, and Additions.*

"(1) For the purpose of this solicitation, buildings, extensions or additions 'which are to be erected by the lessor' do not include:

"(a) Buildings, extensions, or additions, construction of which is substantially completed prior to date of the solicitation.

"(b) New buildings, or extensions of and additions to existing buildings the construction status of which, *on the date of issuance of the solicitation*, met all of the following conditions:

"i. Title to the site was vested in the offeror or he possessed such other interest in and dominion and control over the site to enable starting construction.

"ii. Design was complete.

"iii. Construction financing fully committed.

"iv. A building permit for construction of the entire building, extension or addition had been issued.

"v. Actual construction is currently in progress or a firm construction contract with a fixed completion date has been entered into." (Emphasis added.)

Gateway submitted the following documentation to the contracting officer to establish that its offered building was within the exception of paragraph c(1)(b):

1. A lease dated September 23, 1970, between University City Science Center, landlord, and Gateway, as tenant, for a term of 50 years, with an option to purchase. Opinions of counsel as to the validity of the lease.

2. A letter from the Provident National Bank, Philadelphia, Pennsylvania, dated September 15, 1970, approving a construction loan to the extent of $12,000,000.

3. Building permits issued by the City of Philadelphia.

4. A construction contract dated September 30, 1970, between Gateway and Rosemont Construction Corporation.

5. Drawings to demonstrate the design of the building had been completed.

Since this documentation satisfied the contracting officer that Gateway met the five criteria set out in the solicitation, Gateway was included in the negotiations conducted with Merriam and two other sources. Ultimately, Gateway's offer was accepted on February 18, 1971.

It is Merriam's position that the award to Gateway contravenes the Independent Offices Appropriation Act of 1970 (Public Law 91-556) because the documentation submitted by Gateway does not demonstrate that it fulfilled the five criteria on September 30, 1970, the date of issuance of the request for offers.

With respect to the question whether Gateway possessed "such * * * interest in and dominion and control over the site to enable starting construction," as required by the first criterion, Merriam points out that paragraph 25 of the lease between University City Science Center and Gateway expressly provided that it was made pursuant to a certain redevelopment contract dated November 26, 1965, between the Science Center and the Redevelopment Authority, the terms of which are to be binding on the tenant. In the referenced agreement between the Redevelopment Authority of the City of Philadelphia (Authority) and the Science Center, the Authority agrees to transfer title to the subject property to the Center subject to certain conditions binding on the Center and any transferee thereof. Paragraph 14 of this agreement provides:

"The REDEVELOPER or its nominee shall not sell, lease or otherwise transfer the Project area, or Project, or any part thereof, without the prior written consent of the AUTHORITY until the AU-

THORITY shall have certified in writing that the Redevelopment Project has been completed."

Paragraph 18 of the agreement provides:

"The REDEVELOPER or its nominee shall submit to the AUTHORITY for its review and approval all necessary final plans, designs, and specifications for the development of the Project area, including architectural and landscaping drawings. The REDEVELOPER or its nominee shall not commence any work pursuant to such plans, designs or specifications until approval by the AUTHORITY is made in writing; however, if no written communication is made by the AUTHORITY within thirty (30) days after such submission, AUTHORITY approval is inferred, unless the AUTHORITY requests an additional thirty (30) days for approval. Such approval shall not be unreasonably withheld."

In support of its position that the requisite approval has not been given as of the date of solicitation issuance, Merriam submitted a letter dated March 19, 1971, to a city councilman from the Executive Director of the Authority. The letter states in pertinent part:

"In response to your March 13 inquiry, please be advised that the Redevelopment Authority has approved no lease between the Science Center and Gateway Center Corporation for the above site.

"Preliminary plans for the proposed building on the site were approved in August, 1970. Final working drawings of the building have not yet been submitted for our approval. These plans must be submitted before construction can commence."

A letter dated April 20, 1971, between the same two persons states that while the Science Center has requested the Authority's approval of Gateway, the required documentation had not as of that date been furnished. Another

letter dated September 25, 1970, from the Authority to the Center states that Gateway is accepted as the Center's nominee subject, however, to several conditions such as formal approval by the Authority and the Department of Housing and Urban Development. The record before our Office fails to show that the required approvals were granted as of the date the solicitation was issued.

Your General Counsel's petition in reply is that the approvals have no bearing on the efficacy of the lease and notes that Gateway had taken steps to secure the needed approvals, citing as an example the approval of the preliminary building plans in August of 1970. The point, however, is that in the absence of the Authority's approval of the "final plans, designs, and specifications" pursuant to paragraph 18 of the redevelopment contract between the Authority and University City Science Center, it is difficult to understand how it can be said under any reasonable interpretation of the circumstances and the language of the first criterion that Gateway's interest on September 30, 1970, was such as would "enable starting construction."

While failure to meet the first criterion is, in itself, a sufficient basis to support Merriam's position, we note that documentation submitted by Gateway to show compliance with the fifth criterion is also subject to question. We may agree that the construction contract between Gateway and Rosemont Construction Corporation literally complies with the requirement that there be a "firm construction contract with a fixed completion date." However, Merriam's contention that Rosemont Construction Corporation is controlled by the same individual who controls Gateway and that, subsequent to award, Rosemont entered into a joint venture with a firm with the capacity to perform the work—a capacity which Rosemont allegedly did not have—certainly raises question as to whether Gateway complied with the spirit of the criterion. This question is not, in our opinion, adequately answered by your General Counsel's advice in his letter of July 9 that Gateway complied with the criterion since actual construction is cur-

rently in progress. The issue is whether Gateway complied with the criterion at the time of issuance of the solicitation for offers.

We might add that if the case turned solely on the propriety of GSA's determination that Gateway complied with the third and fourth criteria, we would be inclined to deny Merriam's protest. Insofar as the requirement of the third criterion that financing be fully committed is concerned, the letter dated September 15, 1970, from the Provident National Bank recites that:

> "This letter represents our agreement to provide a construction loan up to a maximum of $12,000,000 * * * subject to the execution of our usual construction loan documentation prior to closing. The interest rate shall be set at market level at the time of closing."

We cannot say that GSA's position that this letter satisfies the requirement that construction financing be fully committed is unreasonable, for there is no indication that the commitment is subject to a material condition, such as Gateway obtaining a lease with GSA.

With respect to the fourth criterion, the question whether Gateway possessed a building permit for construction of the "entire" building involves an interpretative issue and GSA notes in this regard that three permits were issued to Gateway prior to September 30 by the City of Philadelphia Department of Licenses & Inspections for over $12,000 in permit fees. While Merriam urges that Gateway lacked permits for air conditioning, plumbing and electrical work, there is, as GSA points out, no indication that the basic permit is for less than an entire building. More important, in our view, is the following observation in your General Counsel's letter of July 9, 1971, with which we agree:

> "* * * Whether the word 'entire' means 'completed' in the sense of total, final construction is a matter of semantics. GSA does not require the latter which is not only impractical but virtually impossible since in order to meet the SFO [solicitation for offers

requirements] changes, even in building design, might be required.

"All that is required is that a permit has been issued for the building offered. * * *"

The clear implication of Merriam's position with respect to GSA's determination that Gateway complied with the five criteria, particularly insofar as the first and fifth criteria are concerned, is that a reasonable attempt to verify or assure the adequacy of the documentation submitted was not made. From the record before us, we must agree. The attitude of GSA is also reflected in its treatment of the requirement of the second criterion that the design be "complete." From the record, it appears to us that GSA considered that this requirement was complied with by virtue of the approval of the preliminary plans by the Authority in August of 1970, the bank commitment and the issuance of building permits by the City of Philadelphia. This conclusion appears to be bolstered by your General Counsel's advice that the drawings were submitted by Gateway only for the purpose of aiding the contracting officer in evaluating the space in terms of potential use, layout, etc. This interpretation fails, in effect, to accord any independent meaning to the second criterion.

We should add at this point that by letter dated February 17, 1972, Merriam's counsel submitted for our consideration certain depositions and affidavits (which we understand are part of the record before the court). We also received a further letter dated February 28, 1972, from counsel, forwarding a copy of University City Science Center's deed to the property. While we believe that reliance on this additional documentation is unnecessary to support our conclusion, we have examined the documentation and find nothing therein which would detract from Merriam's position.

We recognize that since GSA is charged with the primary responsibility for insuring compliance with the Appropriation Act limitation, its interpretations concerning application of the criteria in any given case must be

accorded great weight. Its determination if reasonable should stand notwithstanding that an alternative approach might appear to be more reasonable. We have expressed our opinion in light of this standard. To sustain GSA's determination here, we would have to say that it was under no duty to conduct a reasonable and independent examination of a particular offeror's compliance with the criteria, including when necessary a request for additional information to resolve reasonable doubts about compliance. Such a conclusion would sanction a complete evasion of the Appropriation Act limitation.

We come now to the corrective aspects of the procurement. Although it is our opinion that the agreement to lease is improper by reason of Gateway's noncompliance with some of the criteria as of the date specified, it does not follow that Gateway must be excluded from any resolicitation of the requirement, as Merriam urges. While noncompliance with the criteria implementing the Appropriation Act limitation at the date of issuance of a particular solicitation for offers may be decisive as to the eligibility of a particular prospective lessor to participate in these negotiations, we do not believe this alone would preclude that proposer from participating in future negotiations. Elimination of Gateway from future participation would release to the competitive aspects of GSA's lease procurements—namely, the right of interested sources to compete equally for lease awards. As we indicated, this question is separate from an inquiry relating to the appropriation restriction. Insofar as the latter question is concerned, we find nothing in the limitation itself which would bar an offeror such as Gateway from future participation. See B-193036, September 2, 1964, wherein we expressed no objection to the subsequent execution of a new lease with an offeror who did not comply with the limitation at the time the original lease was executed.

From the competitive standpoint, it has long been our position that the Government has the duty to secure maximum competition in its procurements. The rights of pro-

spective offerors to exclude other sources from any competition are clearly subordinate to the Government's obligation to secure maximum competition. Moreover, in this context, as Merriam's counsel recognizes in his letter of March 7, 1972, the elimination of Gateway from further participation would require a determination that Gateway was not a responsible prospective contractor because of a lack of integrity.

We cannot ignore the fact that Gateway has made substantial construction progress in reliance on GSA's assurance that it complied with the Appropriation Act limitation. Merriam would have us disregard the equities in favor of Gateway stemming from reliance upon determinations made by GSA. Merriam urges that if Gateway had truly intended to construct a building irrespective of executing a Government loan, there is no real harm done to Gateway in concluding that its lease with GSA is invalid for having failed to comply with solicitation requirements.

But such approach begs the question. If in fact it was certain that Gateway fully intended to construct the building in question apart from GSA interest, there would be little question concerning validity of the lease in terms of the operative appropriation restriction. And it would be difficult to construe as a fatal defect any failure to meet solicitation criteria design solely to establish such intent. In the instant case an issue arises only by reason of the fact that it is not clear as to Gateway's intent apart from GSA's interest. In the circumstances we find it difficult to reach a conclusion that would penalize Gateway for having relied upon the Government's own determination in this matter.

Moreover, we belive that the issues posed by this case are broader than the isolated circumstance of a single lease transaction. GSA's implementation of the appropriation restriction compliance criteria in the instant case is not unique, as our report to the Congress will demonstrate, and there is substantial likelihood that numerous other lessors are similarly situated. Thus, the magnitude and seriousness of the problems created by GSA's administra-

tion of the criteria leads us to conclude that the appropriate course of action for our Office is to draw the entire matter to the attention to the Congress for its consideration and possible corrective legislative action.

In light of the above conclusions we do not propose to initiate any question (in the context of the issues discussed herein) with respect to payments under existing leases. However, we must advise that we have no alternative to raising objection to payments under any lease executed after the date of this decision without proper regard for the restriction against leasing buildings to be erected for the Government, where the restriction is operative both at the time of the lease execution and at the time of payment.

Sincerely yours,

R. F. KELLER
Deputy Comptroller General
of the United States

The Honorable Frederick F. Kreger
Acting Administrator
General Services Administration

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re:

JOHN W. MERRIAM

v.

Date: June 26, 1972

ROBERT L. KUNZIG,
Administrator,
General Services
Administration, et al.

No: Civil Action 71-2262

This is to advise you that Judge John B. Hannum filed Opinion and Order DISMISSING Plaintiff's Complaint.

THE CLERK'S FEE IS $20.50
for said Opinion, Memorandum and/or Order

JOHN J. HARDING, ESQ.
CLERK

By J. M. YAWORSKI (Miss)
Deputy Clerk

Notice to:

C. Clark Hodgson, Jr., Esq.
Goodis, Greenfield, Henry,
Shaiman & Levin, Esqs.
Simons, Kashkashian, Nissenbaum
& Kellis, Esqs.
Obermayer, Rebmann, Maxwell
& Hippel, Esqs.

Copies To:

Carl J. Melone, U.S. Attorney

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OPINION AND ORDER

HANNUM, J. June 26th, 1972

On September 30, 1970, the defendant General Services Administration (hereafter, GSA) solicited bids for the lease of office space for several federal agencies located in the City of Philadelphia. On February 18, 1971 GSA awarded a 20 year lease to Gateway Center Corporation (hereafter, Gateway), the builder of a new office building yet to be constructed. The plaintiff, John W. Merriam (hereafter, plaintiff), is the owner of the Curtis Building, a twelve story office building located at Independence Square in Philadelphia. He, as an unsuccessful offeror of office space, has filed the present action seeking, *inter alia*, a declaratory judgment that the award to Gateway was illegal, an injunction prohibiting the defendants from executing the lease contemplated by the award, and an order compelling GSA to reconsider those offers, other than Gateway's, that were responsive to the original solicitation. Presently before the Court is the defendant's motion for summary judgment pursuant to Rule 56, Fed. R. Civ. P. 28 U.S.C. To deal with the legal questions raised a detailed statement of the facts underlying this controversy is required.

HISTORY OF THE CONTROVERSY

By Presidential directive dated March 27, 1969, the regional boundaries of the Department of Labor, Housing, and Urban Development, Health, Education and Welfare, and the Office of Economic Opportunity were realigned in order to promote their efficiency and to improve their

service to the general public. The City of Philadelphia was designated one of several regional headquarters for each of these agencies. The GSA, charged with the responsibility of providing space for government agencies, implemented the Presidential mandate by adopting a policy requiring the realigned agencies to be headquartered in the same building where feasible. As a consequence of this policy and due to the lack of adequate government-owned office space, a need was created in Philadelphia for approximately 314,000 net useable square feet of office, storage, and related space.[1]

Following an effort to develop competition in the real estate market to supply the required space, GSA conducted a market survey between January 21 and January 28, 1970. During this interval, on January 25 and again on January 28, the Government's interest in acquiring the desired amount of space was advertised in an area newspaper, the Philadelphia Inquirer. Thereafter, thirty-six persons or firms expressed an interest in supplying the Government's needs.[2]

On September 30, 1970, at the direction of A. F. Sampson, Commissioner of GSA's Public Buildings Service, Solicitation for Offers No. NEC (70)-63 was issued to the plaintiff and twenty-five other prospective offerors in the metropolitan area. In response to the solicitation a total of five offers, including the plaintiff's, were received. One bid was withdrawn and another determined to be nonresponsive. Consequently, only three bids remained for GSA's consideration, the plaintiff's, Gateway Center Corporation's, and a third, not relevant to the present controversy. On February 18, 1971, Robert L. Kunzig, Administrator of GSA, upon the recommendation of Commissioner Sampson, authorized the latter to make the presently disputed award to Gateway Center Corporation.[3] On

1. Complaint, paras. 2, 6, 7; Parker Affidavit, Exhibit A.

2. Motion for Summary Judgment, Sampson Affidavit.

3. Complaint, paras. 4, 5, 8; Motion for Summary Judgment, Sampson Affidavit.

February 19, 1971, plaintiff protested the award to the General Accounting Office (hereafter, GAO) which, on September 16, 1971, advised his counsel that it did not feel that it could rule authoritatively on the protest at that time.[4] The plaintiff filed this law suit on the same date.

On November 17, 1971, plaintiff moved for a preliminary injunction requesting that GSA be restrained from executing the Gateway lease and moved under Rule 57, Fed. R. Civ. P., 28 U.S.C., for a prompt hearing. On November 19, the defendants filed a motion for summary judgment which, in addition to seeking judgment as a matter of law, challenged the jurisdiction of this Court and the plaintiff's standing to sue. On November 23, the defendants filed answers to both of the plaintiff's motions and, in light of the jurisdictional issues raised by their motion for summary judgment, requested the Court to defer any hearing on the plaintiff's motions until the motion for summary judgment had been resolved. At a pre-trial conference on December 9, plaintiff withdrew his motion for a preliminary injunction upon the representation of the Government that no lease would be executed with Gateway until the construction of its building had been completed. Thereafter, on February 7, 1972, this Court stayed its hand for thirty days in order to allow the Comptroller General of GAO to rule on the merits of the plaintiff's protest and thereby provide the Court with the benefit of the GAO's expertise in the area of bid protests. See, *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289 (D.C. Cir. 1971). On March 17, 1972, the Comptroller General issued his ruling.[5] Having the benefit of GAO's views, the Court must still resolve the questions of jurisdiction and standing raised by the defendants.

NATURE OF THE CONTROVERSY

The administrator of GSA is empowered to enter into lease agreements necessary for the accommodation of

4. Douglas M. Parker Affidavit, Exhibit E.

5. Appendix A to this Opinion. [See page ... supra.]

federal agencies by virtue of Section 210 of the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. §490(h)(i) (1970):

> "The Administrator is authorized to enter into lease agreements with any person, copartnership, corporation, or other public or private entity, which do not bind the Government for periods in excess of twenty years for each such lease agreement, on such terms as he deems to be in the interest of the United States and necessary for the accommodation of Federal agencies in buildings and improvements which are in existence or *to be erected by the lessor for such purposes* and to assign and reassign space therein to Federal agencies." (Emphasis added)

Since 1963, annual appropriations for GSA's operations have contained the following restriction with regard to payments to be made by GSA for the lease of buildings yet to be constructed by the lessor. The restriction first appeared in the Independent Offices Appropriation Act, 1963, Act of Oct. 3, 1972, P.L. 87-741, tit. I, 76 Stat. 728:

> "No part of any appropriation contained in this Act shall be used for the payment of rental or lease agreements for the accommodation of Federal agencies in buildings and improvements which are *to be erected by the lessor* for such agencies at an estimated cost of construction in excess of $200,000 or for the payment of the salary of any person who executes such a lease agreement: Provided, That the foregoing proviso shall not be applicable to projects for which a prospectus for the lease construction of space has been submitted to and approved by the appropriate Committees of Congress in the same manner as for public building construction projects pursuant to the Public Buildings Act of 1959. (Emphasis added)

During the period presently in controversy, essentially the same restriction appeared in both the Independent Offices

and Department of Housing and Urban Development Appropriation Act, 1970, Act of Nov. 26, P.L. 91-126, tit. I, 83 Stat. 229, and the Independent Offices and Department of Housing and Urban Development Appropriation Act, 1971, Act of Dec. 17, 1970, P.L. 91-556, tit. I, 84 Stat. 1449 (hereafter, I.O.A.A.).

In April and May of 1964 informal discussions were held between representatives of the General Services Administration and the General Accounting Office in an effort to determine the impact of the foregoing restrictions upon the basic authority of the Administrator to enter into lease agreements for the accommodation of Federal agencies. GSA's purpose was to interpret the boundaries of the term "to be erected" and thereby create workable criteria by which the restriction could be observed. These discussions gave birth to what have come to be known as the "5 conditions" which, when met by a lessor of a building "to be erected," have been interpreted by GSA to relieve it from the restrictive language of the Appropriation Acts. Should the lessor of a building to be constructed at a cost in excess of $200,000 certify its compliance with the five conditions, GSA would deem the building to be in existence already and thereby eliminate the need for Congressional approval of a prospectus. The five conditions required to be met by a lessor on the date of the issuance of an invitation for bids are satisfied if:

"(i) Title to the site was vested in the bidder or the bidder possessed such other interest in and dominion and control over the site to enable starting construction;

(ii) Design was complete;

(iii) Construction financing fully committed;

(iv) A building permit for construction of the entire building, extension or addition had been issued;

(A) Actual construction is currently in progress or a firm construction contract with a fixed completion date has been entered into."[6]

These conditions were put into effect on May 15, 1964 by a memorandum from John W. Chapman, Assistant Commissioner for Space Management, to all Regional Administrators of GSA. As of that date they were designated for inclusion in all solicitations for bids where new construction was requested or permitted. In addition to having been included in the solicitation for bids involved in the present dispute, they have been included in thirty other solicitations issued by GSA since 1964.[7]

In response to the solicitation issued in the case at bar, the plaintiff submitted a responsive offer of office space in a building that has been in existence for many years. The building offered by Gateway, however, was, and is, yet to be constructed. As planned, it will stand in the University City Science Center at 36th and Market Streets in Philadelphia and will be a modern fifteen story building providing fourteen consecutive floors of uniform office space. The cost of construction will be in excess of $10,600,000.

To certify its compliance with the "5 conditions" for being considered a building in existence, Gateway submitted with its offer the following documentation:

1. A lease from University City Science Center dated September 23, 1970, accompanied by letters from counsel for both Gateway Center Corporation and University City Science Center of the same date, stating that in their opinion the lease was a valid and binding instrument.[8]
2. Building plans and specifications.[9]

---

6. Motion for Summary Judgment, Shipp Affidavit.

7. *Id.*

8. Motion for Summary Judgment, Sampson Affidavit, Attachment 2.

9. *Id.*, Attachment 3.

3. A letter from Allan C. Kirkman, Assistant Vice President of Provident National Bank, Philadelphia, Pa., dated September 15, 1970, committing the bank to provide a construction loan up to $12,000,000.[10]
4. A building permit issued by the City of Philadelphia Department of Licenses and Inspections dated September 30, 1970.[11]
5. A construction contract between Gateway Center Corporation and Rosemont Construction Corporation, dated September 30, 1970, for the construction of University City Gateway Building No. 1 at the Northeast corner of 36th and Market Streets, Philadelphia, Pa., per plans and specifications of Norwicki and Polillo, Architects, dated September 14, 1970.[12]

In Count I of plaintiff's Complaint it is contended that GSA's acceptance of Gateway's offer was illegal because it violated the requirements of the I.O.A.A. of 1970, and that the defendants Kunzig, Sampson, and Shipp acted arbitrarily, capriciously, and unlawfully because they were instrumental in its acceptance. Specifically, it is averred that the acceptance of an offer to construct a fifteen story building costing in excess of ten million dollars and in which federal agencies will be the sole tenants, required the submission of a lease prospectus to Congress and its prior approval.

In Count II of the Complaint the defendants are charged with arbitrarily and unlawfully interpreting the "which are to be erected by the lessor" language of the I.O.A.A. by prescribing the "5 conditions" and substituting these conditions for the statute they purport to interpret. It is averred that the defendants were not authorized to interpret the I.O.A.A., and that it constitutes a firm con-

10. *Id.*, Attachment 4.
11. *Id.*, Attachment 5.
12. *Id.*, Attachment 6.

gressional mandate restricting GSA's authority to enter into lease agreements for the accommodation of federal agencies. The plaintiff contends that under the I.O.A.A. it was GSA's duty to determine whether or not Gateway intended to build a building independent of the prospect of a government lease, and that GSA failed to perform this duty.

Count III, which is stated in the alternative, accepts *arguendo* the proposition that the defendants were authorized to use the "5 conditions" as a valid statutory interpretation of the I.O.A.A. Nonetheless, it is alleged that the defendants were derelict in their duty by accepting, without investigating, Gateway's representations. It is averred that Gateway made representations in the offer, including the documentation submitted in support thereof, purportedly certifying that the offer complied with the five conditions of the solicitation, whereas, in truth, such representations were false and intentionally misleading.

SUBJECT MATTER JURISDICTION

The first question to be dealt with in this controversy is whether federal jurisdiction exists. In his complaint, the plaintiff has alleged that the matter in controversy exceeds $10,000, exclusive of interest and costs. He has invoked federal jurisdiction on the basis of title 28 U.S.C. §1331 (federal question), §1361 (mandamus), §§2201-02 (declaratory judgment), title 41 U.S.C. §11 (limitation on public contracts), and title 5 U.S.C. §702 (§10 of the Administrative Procedure Act). Because 28 U.S.C. §1331 definitely provides federal jurisdiction in the present case, there is no need to resolve the open question in this Circuit as to whether §10 of the APA provides an independent source of jurisdiction in federal courts for review of agency action.

Title 28 U.S.C. §1331(a) provides:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in contro-

> versy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

Crucial to the determination of whether federal jurisdiction exists under §1331 in the present case are the questions of whether the matter in controversy exceeds $10,000, exclusive of interest and costs, and whether the controversy "arises under" a law of the United States.

There can be no doubt that the plaintiff has satisfied the jurisdictional amount requirement. He claims that GSA's action has caused him to suffer the loss of a prospective beneficial business relationship with the Government. Further, he claims a right to protect that prospective relationship by having GSA's allegedly illegal award to Gateway set aside. Should such a right exist, it would renew the plaintiff's prospect of a business relationship with the Government which would involve an annual amount in excess of $2,000,000. Although the value of the prospective business relationship sought to be protected by the plaintiff would not equal the amount of the lease at stake, it certainly has a value in excess of $10,000 for jurisdictional purposes.

Similarly, there can be no doubt that the present controversy "arises under" a law of the United States. The basis for the plaintiff's suit, for which the plaintiff claims a right of redress under the APA, is GSA's asserted violation of the I.O.A.A. of 1970. Central to the plaintiff's claim is a judicial construction of the I.O.A.A. Whether or not the plaintiff is the proper party to redress GSA's possible violation of a federal law requires a determination of his standing to sue. Whether or not the plaintiff has stated a cause of action upon which relief can be granted requires a judgment on the merits. However, for a federal court to have jurisdiction, and therefore the power to enter a judgment upon the merits, it is sufficient that the plaintiff plead a right to recovery or redress directly involving a controversy respecting the construction or effect of a law of the United States. *Gully v. First*

Nat. Bank in Meridian, 299 U.S. 109, 114 (1936). Inasmuch as a direct violation of a federal law has been pleaded in the present case, and since the claim does not appear immaterial to the law pleaded or "wholly insubstantial and frivolous," this Court has jurisdiction over the subject matter of the present litigation. *Bell v. Hood*, 327 U.S. 678, 682-83 (1946); *State of Delaware v. Pa. N.Y. Cent. Trans. Co.*, 323 F. Supp. 487, 493-95 (D.Del. 1971); *Pennsylvania Environmental Council, Inc. v. Bartlett*, 315 F. Supp. 238, 240 n.1 (M.D. Pa. 1970); *A. G. Schoonmaker Co. v. Resor*, 319 F. Supp. 933, 940 (D.D.C. 1970).

STANDING

As this case has developed, the most difficult question facing this Court has been the determination of the plaintiff's standing to sue.

In general, the question of whether a party has standing to sue is the question of whether he has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy. *Sierra Club v. Morton*, 92 S.Ct. 1361, 1364 (1972). "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Flast v. Cohen*, 392 U.S. 83, 99 (1968). Like the justiciability of the issues sought to be adjudicated, questions of standing must be determined within the framework of Article III which restricts federal judicial power to "cases" and "controversies". *Flast v. Cohen, supra; Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 151 (1970). As was stated in *Sierra Club v. Morton, supra*, 1364-65:

> "Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a 'personal stake in the outcome

of the controversy', *Baker v. Carr*, 369 U.S. 186, 204, as to ensure that 'the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution'. *Flast v. Cohen*, 392 U.S. 83, 101. Where, however, Congress has authorized public officials to perform certain functions according to law, and has provided by statute for judicial review of those actions under certain circumstances, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff."

In *Sierra Club*, a membership corporation composed of conservationists sought a declaratory judgment and injunction to restrain the United States Forest Service and the Department of the Interior from granting approval or issuing permits for the building of a recreational development, aspects of which allegedly violated federal laws governing the preservation of national parks, forests, and game refuges. The Sierra Club sought judicial review relying upon §10 of the Administrative Procedure Act (APA), 5 U.S.C. §702. The plaintiff in the present case proceeds on the same basis.

To determine a plaintiff's standing to initiate review under §10 of the APA, the Supreme Court referred to its analysis of the same question in the companion cases of *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, and *Barlow v. Collins*, 397 U.S. 157 (1970). There, two important criteria were set forth when the Court held:

". . . that persons had standing to obtain judicial review of federal agency action under §10 of the APA where they had alleged that the challenged action had caused them 'injury in fact', and where the alleged injury was to an interest 'arguably within the zone of interests to be protected or regulated' by the statutes that the agencies were claimed to have violated." 92 S.Ct. at 1365.

Under the facts of the present case, the plaintiff has little difficulty in meeting the first criteria set forth in *Data Processing* and reiterated in *Sierra Club*. The plaintiff has alleged that the loss of a prospective beneficial business relationship has caused him irreparable damage. In each count of the complaint he alleges that he is "aggrieved and palpably injured" by the defendants' allegedly illegal action. From the facts in this case, there can be little doubt that the plaintiff has suffered the "injury in fact" necessary to provide standing to initiate review under §10 of the APA.

The plaintiff, however, encounters greater difficulty in demonstrating that he comes within the second criteria, that the interest he seeks to protect is "arguably within the zone of interests to be protected or regulated" by the statute claimed to have been violated by the defendants.

To determine the zone of interests to be protected by the I.O.A.A. requires analysis of its legislative history. The language requiring GSA to submit a prospectus to Congress prior to entering into a lease construction contract for a building costing more than $200,000 first appeared in the I.O.A.A. of 1963. The purpose for the restriction is set forth in the report from the Committee on Appropriations, H.R. Rep. No. 2050, 87th Cong., 2d Sess. 13 (1962). The relevant language reads:

> "The General Services Administration wants to build several new buildings in the District of Columbia under a lease construction program to provide 1 million square feet of additional space. The entire space in each building is to be rented by the Government. With this procedure the Committee disagrees since they are completely financed new buildings under lease construction contracts. The Committee believes that the Government should own the buildings instead of giving somebody a ten to fifteen year payout. The concern of the Committee is that lease construction is clearly the most expensive method of providing Government space. Under this method the

> Government pays rent at $4 to $4.25 per square foot per year and never obtains title to the property. A limitation on use of funds for lease construction projects costing over $200,000 has therefore been included in the bill, but it provides that a project may proceed after obtaining legislative approval in advance of a commitment in the same manner as for public building construction projects financed by direct appropriations pursuant to the Public Buildings Act of 1959."

From the foregoing, it is apparent that, by enacting the restrictive provisions of the Act, Congress was solely concerned with achieving economy in Federal spending. The very fact that this restriction has repeatedly appeared in annual appropriation legislation, rather than in an amendment to the basic leasing authority of the Administrator serves to reenforce this view. That which is to be both protected and regulated is the Federal budget. The interests to be protected are those of the Government and of the general public in minimizing governmental expenditures. The question then, is whether the specific interest sought to be protected by the plaintiff falls "arguably" within this zone.

The specific interest of the plaintiff as it appears in the complaint is stated to be:

> ". . . that the offers which were responsive on the date the bid period closed be considered for the award and that it be made in accordance with applicable federal statutues. . . . [T]he interest [asserted] is the same as any bidder possesses in public contract cases: an interest in having the government, in its business dealings with the public, proceed according to law."[13]

The plaintiff concedes that his specific interest is not among the interests sought to be protected by the

13. Plaintiff's Supplemental Brief, 21-22.

I.O.A.A.[14] But he argues that he has standing to protect the public interest as a "private attorney general", and that, as such, the "zone of interests" requirement of *Data Processing* should be liberally construed "to enable any plaintiff to 'argue' that he has an interest protected or regulated within a given statute."[15] In support of this proposition the plaintiff advances a recent line of cases from the District of Columbia commencing with *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970).

Scanwell involved a bid protest similar to the present. The Federal Aviation Administration had issued an invitation for bids on instrument landing systems to be installed at airports. Scanwell Laboratories was an unsuccessful bidder who had submitted the second lowest bid. Because the lowest bidder had allegedly failed to comply in all respects with the invitation for bids, Scanwell filed suits to have its acceptance set aside claiming that the FAA's award of the contract to an allegedly non-responsive bidder was arbitrary, capricious, and a violation of the statutory provisions controlling government contracts. Judicial review was sought on the basis of §10 of the APA. Although the district court had dismissed the suit for lack of standing, the District of Columbia Circuit reversed, holding that Scanwell had standing to sue as a "private attorney general":

> "Thus the essential thrust of the appellant's claim on the merits is to satisfy the public interest in having agencies follow the regulations which control government contracting. The public interest in preventing the granting of contracts through arbitrary or capricious action can properly be vindicated through a suit brought by one who suffers injury as a result of the illegal activity, *but the suit itself is brought in the*

---

14. In his brief he states, "Can this Court find the plaintiff's interest specifically identified in the statute or legislative history, certainly not." Plaintiff's Supplemental Brief, 23.

15. *Id.*, at 17.

public interest by one acting essentially as a 'private attorney general'." 424 F.2d 859, 864 (emphasis added).

The "private attorney general" doctrine developed during a period in which standing was held to be lacking unless the interest sought to be protected constituted "a legal right, —one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege". *Tennessee Electric Power Co. v. TVA*, 306 U.S. 118, 137-38 (1939); *Perkins v. Lukens Steel Co.*, 310 U.S. 313, 325 (1940). The concept was designated to permit those with less than recognized legal rights to establish an otherwise lacking "case" or "controversy" by acting as private attorneys general to vindicate the interest of the public in preventing unlawful agency action. It was first employed in *Associated Industries v. Ickes*, 134 F.2d 694 (2 Cir. 1943), vacated as moot, 320 U.S. 707 (1943), where an association of coal consumers sought to challenge an order of the National Bituminous Coal Commission increasing the minimum prices of coal. Judge Frank advanced the theory to reconcile two previous decisions of the Supreme Court, *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940), and *Scripps-Howard Radio v. FCC*, 316 U.S. 4 (1942), with the "legal right" doctrine. In *Sanders* and *Scripps-Howard*, radio stations suffering increased competition as a result of FCC action were granted standing on the basis of §402(b)(2) of the Communications Act[16] which provided review for persons "aggrieved" or "adversely affected" by decisions of the Commission. In *Associated Industries*, Judge Frank granted standing on the basis that the petitioners were persons "aggrieved" within the meaning of the review provision in the Bituminous Coal Act of 1937:[17]

". . . Congress can constitutionally enact a statute conferring on any non-official person, or on a desig-

16. Act of June 19, 1934, c. 652, tit. IV, §402(b)(2), 48 Stat. 1093.

17. Act of April 26, 1937, c. 127, §6(b), 50 Stat. 85.

> nated group of non-official persons, authority to bring a suit to prevent action by an officer in violation of his statutory powers; for then . . . there is an actual controversy, and there is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals. ". . . If, then, one is a 'person aggrieved', he has authority by review proceedings under §6(b), to vindicate the public interest involved in a violation of the Act . . . , even if he can show no part or threatened invasion of any private legally protected substantive interest of his own." 134 F.2d 694, 704-05.

Scanwell was decided when the weight of adverse commentary and decisional law was pressing for the abandonment of the legal right doctrine in government contract cases. After analysis of its legislative history, it was held that Congress had intended to incorporate the private attorney general concept into the Administrative Procedure Act. As a result, it was held that the APA provides standing to any person "in fact aggrieved" by agency action. In so holding, the court rejected the legal right doctrine and reduced the requirements for standing to the minimum necessary to provide a constitutional "case" or "controversy". In *Data Processing*, however, decided less than one month later, the Supreme Court did not go as far. In requiring complainants to demonstrate "injury in fact" it, too, rejected the legal right doctrine, but it added the non-constitutional requirement that the interest sought to be protected by the complainant be arguably within the zone of interests to be protected or regulated by the statute claimed to have been violated. It is clear that the Scanwell decision did not include, and therefore did not consider, this requirement.

The District of Columbia Circuit may have been correct in its analysis of the APA's legislative history. But

assuming that it was, it is impossible to assume further that the Supreme Court intended the private attorney general concept "arguably" to supply the interest necessary to meet the "zone of interests" requirement. That requirement is inherently restrictive. It is antithetical to the private attorney general concept which would apply to any plaintiff who challenged an agency's violation of any statute. If, in *Data Processing*, the Supreme Court intended to permit any person injured in fact to have standing as a private attorney general under the APA, then the zone of interests requirement would have been surplusage and never imposed. Consequently, there is little basis for accepting the plaintiff's contention that the *Scanwell* decision placed him "arguably" within the zone of interests necessary to confer standing.[18] Because the specific interest of the plaintiff

18. The cases decided after Scanwell and Data Processing do not alter this conclusion. In *Ballerina Pen Company v. Kunzig*, 433 F.2d 1204 (D.C. Cir. 1970), *Data Processing* was followed and the interest sought to be protected by the plaintiff was held to be arguably within the zone of interests sought to be protected by the Wagner-O'Day Act. In *Blackhawk Heating & Plumbing Co. v. Driver*, 433 F.2d 1137 (D.C. Cir. 1970), however, the court only restated the requirements of *Data Processing*, applying in fact the requirements of *Scanwell*. In *A. G. Schoonmaker Co., Inc. v. Resor*, 319 F.Supp. 933 (D. D.C. 1970), *Data Processing* was not considered and *Scanwell* was followed without analysis. In *Shannon v. U.S. Dept. of Housing and Urban Dev.*, 436 F.2d 809 (3 Cir. 1970), the interest sought to be protected by the plaintiff was held to be arguably within the zone of interests to be protected by the Housing Act of 1949. In *American Standard, Inc. v. Laird*, 326 F.Supp. 492 (D. D.C. 1971), *Data Processing* was not considered and *Scanwell* was followed without analysis. In *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), no question of standing was raised. And in *National Helium Corp. v. Morton*, 326 F.Supp. 151 (D. Kan. 1971), *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289 (D.C. Cir. 1971), and *Wheelabrator Corp. v. Chafee*, 455 F.2d 1306 (D.C. Cir. 1971), *Data Processing* was not considered and *Scanwell* was followed without further analysis.

Not all courts have overlooked the conflict between *Scanwell* and *Data Processing*. See, e.g., *Gary Aircraft Corp. v. Seamans*, 40 U.S.L.W. (W.D. Tex. May 8, 1972) which, to the extent that it applies the *Data Processing* zone of interest requirement, is adopted by this Court.

cannot reasonably be considered to be included in the zone of interests to be protected or regulated by either the I.O.A.A. of 1970 or 1971, this Court is forced to conclude that the plaintiff lacks standing to sue and that his complaint must be dismissed.

My decision is compelled by the present state of the law, yet considering the nature of the remedy available to the plaintiff had he standing and were he to prove his case, his present status may simply be an advancement of the inevitable. He concedes that this Court is not empowered to make a contract for him. His remedy, at best, would be to have the award to Gateway set aside. Such action suggests one of two results: that the Government be compelled to award a lease to either the plaintiff or the other remaining responsive offeror, or, that the Government be compelled to resolicit bids altogether. If the latter course of action were adopted, the additional question would be raised as to whether Gateway should be excluded from further competition.

The wholesale exclusion of Gateway in either case would have to be weighed against the public interest in having the federal socio-economic agencies housed in a location which would provide optimal impact for the services to be provided and in a structure that would facilitate the highest interdepartmental efficiency.

The present record reflects major differences between the location and building offered by Gateway and those offered by the two other responsive bidders.[19] Of considerable significance is the high preference accorded the Gateway location by all Federal, State, and local agencies consulted.[20] It is clear that were Gateway to be excluded to vindicate one public interest, it would be done so only at the expense of another.

In its decision not to object to GSA's action, GAO suggests that nothing beneficial would be accomplished by upsetting the present award in order to satisfy the plain-

19. See Appendix B. Commissioner Sampson's recommendation of February 18, 1971, p. 3-4.

20. *Id.*, 5-8.

tiff's asserted right to reconsideration.[21] The positive aspects of the Gateway project are manifest. If there has been harm in GSA's action, it has been harm in the method, not in the result.

ORDER

AND NOW, this 26th day of June, 1972, it is ORDERED that the Plaintiff's Complaint be, and is, hereby DISMISSED.

JOHN B. HANNUM
J.

---

21. Appendix A, 10-11.

APPENDIX A

Comptroller General's Decision B-171958, letter of March 17, 1972; see Appendix 2, p. 21a et seq.

APPENDIX B

UNITED STATES OF AMERICA
GENERAL SERVICES ADMINISTRATION

February 1, 1971

Public Buildings Service
Washington, D.C. 20405

Reply to Attn. of: Commissioner, Public Buildings Service — 1

Subject: Consolidation—Socio-Economic Agencies, Philadelphia, Pennsylvania

Mr. Robert L. Kunzig
The Administrator - A

In March 1969, President Nixon, so as to enhance the efficiency and effectiveness of the Federal human resources programs and to improve service to the general public, directed that common regional boundaries and headquarters for the regional offices of the various Federal agencies be established. It was determined by the Office of Management and Budget that the regional activities of the Departments of HUD, HEW, Labor and the OEO should be collocated in the new regional headquarters cities. Philadelphia was designated as one of the headquarters cities.

A. *Implementation of the Directive to Collocate the Socio-Economic Agencies.*

In the absence of sufficient Government-owned space in which to collocate the socio-economic agencies in Philadelphia, it is necessary to acquire by lease approximately 314,000 net usable square feet of space for this program.

a. *Procedure.*

(1) *Market Survey.* The projected space requirement for the collocation was advertised in the Philadelphia Inquirer on 1/23/70 and 1/25/70, and a market survey was conducted during the period 1/21 through 1/28/70. On March 3, 1970, market survey questionnaire letters were distributed to 36 entrepreneurs who had manifested an interest in supplying the required space.

(2) *Solicitation for Offers.* On September 30, 1970, Solicitation for Offers NEG(70)-63 was issued to 26 prospective offerors. The solicitation called for 314,000 square feet, with a minimum of 20,000 square feet of office space per floor on contiguous floors, located within the city of Philadelphia, for a firm term of 20 years, to be delivered July 1, 1972. Award factors include those specified in Executive Order 11512. A requirement for an affirmative action plan to ensure equal employment opportunity was made a special condition of the solicitation.

(3) *Receipt of Offers and Negotiations.* Initial offers for 5 locations were received and ultimately negotiated to the final offered price.

OFFEROR	LOCATION	INITIAL PRICE/SQ FT	FINAL
1. Gateway Centre Corp.	Gateway Building #1, NE Corner, 36th & Market Streets	$8.90	$7.67 ($2,316,000 per year)
2. 401 N. Broad Street Corp.	401 N. Broad Street	$6.17	$5.604 ($1,700,000 per year)
3. Binswanger Corp.	Bourse Building, 21 S. 5th Street	$7.56	Withdrew
Binswanger Corp.	Ford-Philco Plant, 4700 Wissahickon Ave.	$7.14	$5.10 ($1,905,980 per year)
4. Richard B. Herman & Co.	Curtis Building, 6th & 7th & Walnut & Juniper Streets	$6.38	$7.09 ($2,173,562 per year)

(4) *Compilation of Data Award Factors.* In order to comply with criteria established in Executive Order 11512, appropriate Federal, State, and local agencies were consulted about the prospective impact of the offered locations on the social and economic development of the community. Visits were made to the Philadelphia Planning Commission, Philadelphia Bicentennial Corporation, and other affected public and private agencies. The Secretaries of Commerce, HEW, and HUD were requested to provide representation on an ad hoc committee to advise with respect to the factors set forth in the executive order, and those agencies were asked to advise us as to the comparative merits of each of the proposed locations. A city task force on intergovernmental cooperation was also formed under the chairmanship of Philadelphia Mayor James H. J. Tate to evaluate the sites offered under the

terms of the Intergovernmental Cooperation Act and OMB Circular A-95. The information and data obtained were related to the proposed sites by field inspection.

B. *Evaluation of Offers.*

a. *Responsiveness to Solicitation and Economy Act.* The offers submitted for Gateway Building #1, 401 N. Broad, and the Curtis Building are responsive to the requirements and specifications of the solicitation. The offer for the Bourse Building was withdrawn by the offeror. The offer for the Philco-Ford Plant was not responsive because the offeror will not accept the escalation provisions as required, nor firmly commit to deliver the required space by July 1, 1972.

All of the above responsive offers are within the appraised fair rental values and Economy Act Limitations.

b. *Space Utilization.*

(1) *Gateway Building #1.* This building is located in the University City Science Center. It is a new modern, 15-story office building, rectangular in shape, measuring 200′ x 120′, serviced by a centrally located core area with high speed elevators. The building will provide 14 consecutive office floors of 20,000 square feet each with uniform configuration. Its interior column spacing is on uniform 24′6″ centers with exterior window space on a 3′6″ module. Its design, configuration, and column spacing will assure an efficient layout, effective utilization of the space, and a continuing high degree of flexibility for space changes over the 20-year firm term of the proposed lease.

(2) *401 N. Broad Street.* This building was constructed in 1930 for semi-industrial and storage purposes with related office space. It is rectangular in shape, measuring 225′ x 525′, and contains approximately 1,000,000 square feet. Floors 6 to 11, offered to the Government, are "U" shaped, divided by a light well.

The Federal agencies presently occupying the building have been dissatisfied, over an extended period of time, with the building's elevators, air conditioning, heating and restroom facilities. Although the owner can improve upon some of these deficiencies in accordance with the specifications of our lease solicitation, it will not be possible to entirely correct the functional obsolescence of the building's mechanical systems. In these circumstances, it can be expected that agency dissatisfaction will continue to some extent, with an attendant drop in morale and agency efficiency.

Several other characteristics of the building preclude optimum space utilization and functional space layout. The building has large circular columns and column spacing varies at several locations within the building. There is no standard module. Mechanical shafts are located throughout the space as opposed to being confined to a central core. The extended distance from the primary corridors requires an extensive secondary corridor system. Finally, of the seven floors offered, only two floors are offered in their entirety. Various sized sections of the other five floors are offered and will result in the inefficient splitting of functional agency components to fit the space available.

In summary, the design of the building, the built-in functional obsolescence, and the adverse layout characteristics will not produce effective space utilization and optimum operational efficiency in agency activities.

(3) *Curtis Building.* This building, constructed about 1916, was designed for a combination of heavy industry and manufacturing use with some related office space. The building is rectangular in shape, approximately 230' x 375', and contains approximately 1,000,000 square feet. It is divided into 4 basic areas each served by freight and passenger elevators. Accessibility is restricted between areas because of a central light court and the scattered placement of fire stairs, elevators and mechanical

areas. The column spacing is irregular (13, 18, and 20 feet) with varied column spacings from floor to floor and within floors. On the 10th and 11th floors, both of which have been offered for lease, there are variations in elevations, requiring ramp or stair access. The office space will contain a relatively high proportion of interior windowless space. The configuration of the building would necessitate an extensive corridor system to provide appropriate access to all of the operational units of the agencies to be accommodated and will not produce an efficient space layout. Thus, the effective cost of the space actually utilized for office purposes will be increased above that which would prevail in a building designed for office purposes.

C. *Summary of Advice Regarding Locations.*

1. *Gateway Building #1.* The City Task Force on Inter-governmental Cooperation ranked this site as being the best. The Department of Health, Education, and Welfare, after a detailed analysis, rated this site the highest. The Department of Commerce also preferred this site, indicating it offers the best location for the programs administered by the agencies and, because of its convenience to nearby neighborhoods, offers opportunities for hiring and training of disadvantaged people.

2. *401 North Broad Street.* None of the advising agencies rated this location as their first choice. This location is not as conveniently located as the Gateway Building #1 with respect to educational and training facilities needed to adequately support the agencies being housed. Additionally, the acquisition of this location would have a very limited positive impact on the local goals of the renewal programs in the City of Philadelphia.

3. *Curtis Building.* Those advising agencies which provided a priority listing of the various sites did not rate this location as the preferred site for the collocation. Overall, the acquisition of space at this location would not have any positive effect on ongoing Federal programs for the

development and/or redevelopment of the City of Philadelphia.

D. *Analysis and Findings*

Executive Order 11512 requires selection of the offer which will achieve the optimum blending and benefit in terms of the stated criteria set forth in the Order. One of the primary factors is attaining the maximum impact of the Federal monies being expended in direct or assisted programs in the community.

Each of the three locations responsive to the requirements and specifications of the solicitation have been analyzed with respect to meeting the criteria of the Executive Order and the advice received from other Federal and city agencies concerned. The Gateway Building #1 is the first choice of the city, HEW, Commerce and DHUD.

The City's Task Force made a comprehensive analysis of the sites under consideration and ranks the Gateway Building as the strongly preferred location by a considerable margin. The Task Force has also indicated that this building is in complete conformance with the local goals of the renewal programs in the City of Philadelphia.

In summary, there is a definite preference on the part of the concerned governmental organizations for the Gateway Building #1 location. Detailed support for the selection of this location is evidenced by the following:

a. *Housing*. A survey of employee domicile was conducted of all Federal employees involved with the collocation move. This survey found that approximately 72 percent of all employees in grades 1 to 6 live within the City of Philadelphia. The Gateway Building #1 site is readily accessible from all areas of the city.

A large supply of low and moderate income housing has been provided through the city's Housing Authority and the quasi-public Philadelphia Housing Development Corporation. Some 15,000 units of this housing supply are located in the nearby Center City, Lower North, and West

Philadelphia areas. In addition to these city efforts, the West Philadelphia Corporation, which is composed of the University of Pennsylvania, Drexel Institute, Presbyterian Hospital and other similar institutions, has sponsored the redevelopment of low cost housing in proximity to the University City Science Center.

b. *Transportation.* The Gateway Building #1 is located in an area with excellent transportation facilities by several modes which provide good accessibility for agency employees and clients. Subway service is available at the nearby 34th Street Station. There are several bus lines and street car routes operating on the streets adjacent to or within easy walking distance of Gateway Building #1. This location is in proximity to the 30th Street Commuter Rail Station and the planned through-rail connection to Penn Center Station and the Reading Terminal. There is good accessibility, via the Schuylkill Expressway and the planned Schuylkill Expressway Bypass, to the freeway system serving the general area. There are several arterial streets serving the area and the impact of traffic generated by this facility will be minimal. Parking facilities are planned as a part of the development of the University City Science Center.

c. *Community Facilities.* The central location and excellent transportation facilities serving this site make the Gateway Building #1 readily accessible to a wide array of community facilities within the City of Philadelphia. The location is particularly convenient to institutions of higher learning including the University of Pennsylvania, Drexel Institute, and the Franklin Institute. These institutions offer exceptional opportunities for employee training and for Government research.

d. *Impact on Neighborhood.* The impact of this complex on the nearby community in West Philadelphia will be extremely beneficial. A survey of the socio-economic problems within Philadelphia has shown the areas immediately north and west of the University City Science

Center have some of the most severe problems of low family income, unemployment, and educational attainment. The selection of this site will expand the impact of approximately $18,600,000 in Federal funds which have been expended to assist in the redevelopment and revitalization of this area. The occupancy of this building will reinforce the beneficial impact the construction of the Food and Drug laboratory building on Market Street, west of 38th Street, will have on the neighborhood, and serve as a catalyst to accelerate the development of the University City Science Center.

e. *Conformity to Existing Plans.* The Gateway Building #1 site and the University City Science Center complex has been officially designated by the City of Philadelphia as a redevelopment area. Full community participation was obtained in the planning process prior to the city's approval.

f. *Coordination with Local, State and Federal Officials.* Mayor Tate's Task Force expressed his city's strong support of the Gateway Building #1 over the other possible sites. Many other prominent citizens of the city, including the Executive Vice-President of the Greater Philadelphia Chamber of Commerce and the Chairman of the Board of the Philadelphia Bicentennial Corporation, expressed similar support for this site. Governor Milton J. Shapp and former Governor Raymond P. Shafer both have indicated that the State supports the Gateway Building #1 site. Senators Hugh Scott and Richard S. Schweiker have strongly backed the collocation move to this site. The socio-economic impact of this site selection was also carefully reviewed with appropriate officials of the Departments of Commerce, HEW and DHUD, and they have indicated a preference for the Gateway Building #1 location.

E. *Conclusions and Recommendation.*

Three responsive offers have been received. The offer by the owners of the Gateway Building #1 exceeds the offer of space in the Curtis Building by $.58 per square foot or approximately $142,000 per year, and the offer of space at 401 North Broad Street by $2.07 per square foot or $616,000 per year. The Government, through the local redevelopment authority, has invested $18,000,000 in the University City Science Center. Development of this center is lagging, and the community is not realizing any return from the Federal funds which have been committed. The acquisition of space in the Gateway Building #1 will expand the impact of these funds and secure for the community the benefits envisaged at the time of those expenditures. Such action will also secure for the Government modern, first-class office space which will provide for optimum operational efficiency on the part of the agencies to be housed. The acquisition of space through acceptance of the third highest offer is in accordance with the objectives and aims of Executive Order 11512 and the requirements of the Federal Property and Administrative Services Act of 1949, as amended. Therefore, it is recommended that the Gateway Building #1 be selected for the collocation of the Federal socio-economic agencies in Philadelphia, and that I be authorized to proceed with the award of the lease contract.

A. F. Sampson
Commissioner
Public Buildings Service

APPROVED:

The Administrator

February 18, 1971
Date

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1686

JOHN W. MERRIAM, *Appellant*

v.

ROBERT L. KUNZIG, Administrator, General Services Administration, A. J. SAMPSON, Commissioner, Public Building Service of the General Services Administration, L. M. SHIPP, JR., Assistant Commissioner, Space Management of the General Services Administration and the GENERAL SERVICES ADMINISTRATION of the United States of America

---

(D. C. Civil Action No. 71-2262)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued December 7, 1972

Before VAN DUSEN, GIBBONS and HUNTER,
Circuit Judges

C. Clark Hodgson, Jr., Philadelphia, Pa., *Attorney for Appellant*.

Kent Frizzell, Philadelphia, Pa., Carl J. Malone, Philadelphia, Pa., Warren D. Mulloy, Philadelphia, Pa., Robert A. Prince, Philadelphia, Pa.

George R. Hyde, Washington, D.C., Rembert A. Gaddy, Washington D.C., Anthony Borwick, Washington, D.C., Eva R. Datz, Washington, D.C., *Attorneys for Appellees.*

OPINION OF THE COURT

(Filed February 16, 1973)

GIBBONS, *Circuit Judge.*

This is an appeal from an order of the district court dismissing the complaint of appellant Merriam on defendants' motion for summary judgment for lack of standing. Merriam is one of two unsuccessful bidders on a solicitation for bids to furnish leasehold office space to the General Services Administration (GSA). That agency and several of its officials are defendants. Merriam seeks to have set aside an award made by GSA to Gateway Center Corporation (Gateway) for a twenty year lease of a new office building to be constructed in Philadelphia, and to have enjoined the execution of the proposed lease.

GSA's Solicitation for Offers for leasehold space was issued on September 30, 1970, to Merriam, to Gateway and to twenty-four other prospective offerors in the Philadelphia metropolitan area. Five bids were received. One was withdrawn and another was determined to be nonresponsive. On February 18, 1971, the Administrator of GSA authorized the making of the disputed award to Gateway. On February 19, 1971, Merriam, pursuant to 4 C.F.R. §§20.1-20.12 (1972), protested the award to the General Accounting Office, which on September 16, 1971, advised him through counsel that it could not rule authoritatively on the protest at that time.[1] As soon as he was so advised

1. The General Accounting Office regulations respecting bid protests did not at the time contain time limitations for the filing of protests, the submission of comments by the agency involved, or the ruling by the Comptroller General. These defects were remedied by new regulations issued at 36 Fed. Reg. 24791 (Dec. 23, 1971)

Merriam commenced this lawsuit. On November 17, 1971, he moved for a preliminary injunction restraining the GSA from executing a lease pending determination of the cause, and, pursuant to Rule 57, Fed. R. Civ. P., for a prompt hearing. The government defendants made a cross motion for summary judgment, raising among others the issue of Merriam's standing to sue. They also requested that the court defer decision on Merriam's motions until the standing issue was resolved. This, of course, would have left GSA free *pendente lite* to execute the disputed lease. At a pretrial conference on December 9, 1971, however, Merriam withdrew his motion for a preliminary injunction on the representation of the Government that no lease would be executed with Gateway until the construction of the proposed building had been completed. The district court soon thereafter stayed all proceedings. On February 7, 1972, over Merriam's objection, it entered an order which provided in part:

> ". . . because the defendant has advised the Court that the General Accounting Office is reviewing its lease construction practices, including the present bid protest, it is hereby ORDERED that the Court will stay its hand for 30 days pending receipt of the results of such review."

The General Accounting Office review was not completed until March 17, 1972. In the meantime Gateway's building was under construction, but no lease had been executed.

---

effective January 23, 1972. See 4 C.F.R. §§20.1-20.12. The new regulations also provide:

> "§20.4. Withholding of award.
>
> When notice is given the agency that a protest has been filed with the General Accounting Office, award shall not be made prior to a ruling on the protest by the Comptroller General, unless there has first been furnished to the General Accounting Office a written finding by the head of the agency, his deputy, or an Assistant Secretary (or equivalent), specifying the factors which will not permit a delay in the award until issuance of a ruling by the Comptroller General."

The March 17, 1972 ruling by the Deputy Comptroller General of the United States was to the effect that the award to Gateway was improper in several respects to which more specific reference will be made hereafter, but that because Gateway had made substantial construction progress in reliance on GSA's assurance that it had complied with the governing law, the Comptroller General would not initiate any question

> ". . . with respect to payments under existing leases. However, we must advise that we have no alternative to raising objection to payments under any lease executed after the date of this decision without proper regard for the restriction against leasing buildings to be erected for the Government, where the restriction is operative both at the time of lease execution and at the time of payment."

The quoted language of the March 17, 1972 ruling may be understood in the context of the next preceding paragraph of the ruling, which explained that GSA's improper leasing practices were not confined to the isolated circumstances of a single lease transaction, and that the magnitude and seriousness of the problem created by GSA's administration of its leasing program required that the entire matter be referred to Congress for possible corrective legislative action. Thus, the General Accounting Office position seems to have been (1) that the award to Gateway was illegal, (2) that it would not challenge payments under existing leases, and (3) that as to leases not yet in existence it recognized that Congress could authorize future payments even though the award may have been improper. The ruling does not disclose whether the General Accounting Office was aware of the actual Gateway-GSA situation; that is, that the Government had represented that it would not execute a lease until the building was complete, and no lease had yet been executed.

The March 17, 1972 ruling was brought to the attention of the district court by stipulation. It then took up and

granted the Government's motion for summary judgment on the ground that Merriam lacked standing, as an unsuccessful bidder, to challenge an illegal award. This appeal followed.

Merriam's Legal Contention

The Solicitation by GSA was made under the authority of the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. §490(h)(1):

> "The Administrator is authorized to enter into lease agreements . . . which do not bind the Government for periods in excess of twenty years . . . on such terms as he deems to be in the interest of the United States and necessary for the accommodation of Federal agencies in buildings and improvements which are in existence or to be erected by the lessor for such purposes. . . ."

This general leasing authority is limited, however, by a statute, 41 U.S.C. §11(a), applicable to all public contracts:

> "No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment. . . ."

Merriam contends that the leasing authority of GSA has, since 1963, been further limited by provisions reenacted annually.[2] The statute in effect on September 30, 1970, was the Independent Offices Appropriations Act, 1971, Pub. L. No. 91-556, 84 Stat. 1442, which provides:

---

2. Independent Offices Appropriations Act, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971; Pub. L. No. 87-741, 76 Stat. 716; Pub. L. No. 88-215, 77 Stat. 425; Pub. L. No. 88-507, 78 Stat. 640; Pub. L. No. 89-128, 79 Stat. 520; Pub. L. No. 89-555, 80 Stat. 663; Pub. L. No. 90-121, 81 Stat. 341; Pub. L. No. 90-550, 82 Stat. 937; Pub. L. No. 91-126, 83 Stat. 221; Pub. L. No. 91-556, 84 Stat. 1442.

"No part of any appropriation contained in this Act shall be used for the payment of rental on lease agreements for the accommodation of Federal agencies in buildings and improvements which are to be erected by the lessor for such agencies at an estimated cost of construction in excess of $200,000 or for the payment of the salary of any person who executes such a lease agreement: *Provided*, That the foregoing proviso shall not be applicable to projects for which a prospectus for the lease construction of space has been submitted to the Congress and approval made in the same manner as for public buildings construction projects pursuant to the Public Buildings Act of 1959 [40 U.S.C. §§601-15]."

In preparing the Solicitation which resulted in the disputed award, GSA recognized that it was bound by the quoted provision of the Independent Offices Appropriations Act, 1971, the obvious purpose of which was to prevent without prior congressional approval the financing of new building construction on the credit of the United States by the use of government leases.[3] In the Solicitation GSA

3. Explaining the purpose of the lease construction provision in the Independent Offices Appropriations Act, 1963, Pub. L. No. 87-741, 76 Stat. 716, where it first appeared, the House Appropriations Committee said:

"The General Services Administration wants to build several new buildings in the District of Columbia under a lease construction program to provide 1 million square feet of additional space. The entire space in each building is to be rented by the Government. With this procedure the Committee disagrees since they are completely financed new buildings under lease construction contracts. The Committee believes that the Government should own the buildings instead of giving somebody a ten to fifteen year payout.

The concern of the Committee is that lease construction is clearly the most expensive method of providing Government space. Under this method the Government . . . never obtains title to the property. A limitation on use of funds for lease construction projects costing over $200,000 has therefore been included in the bill. . . ." H.R. Rep. No. 2050, 87th Cong., 2d Sess. 13 (1962).

made reference to the fact that each year since 1963 the lease construction prohibition had appeared in the Independent Offices Appropriations Act. It provided that if the bid were for a building to be erected by the lessor the bid must remain open for an additional 120 days beyond that normally specified to afford the Government adequate time to obtain congressional approval. It then provided:

> "(1) For the purpose of this solicitation, buildings . . . 'which are to be erected by the lessor' do not include:
>
> (b) New buildings . . . the construction status of which, on the date of issuance of the solicitation, met all of the following conditions:
>
> i. Title to the site was vested in the offeror or he possessed such other interest in and dominion and control over the site to enable starting construction.
>
> ii. Design was complete.
>
> iii. Construction financing fully committed.
>
> iv. A building permit for construction of the entire building, extension or addition had been issued.
>
> v. Actual construction is currently in progress or a firm construction contract with a fixed completion date has been entered into."

It is undisputed that at the time of the solicitation the Gateway site was a vacant lot in an urban renewal area in the city of Philadelphia, and that the proposed Gateway lease was never submitted to Congress.

Merriam's complaint alleges (1) that Gateway met none of the five criteria set forth in the Solicitation, (2) that the five criteria are in any event an improper interpretation of the Independent Offices Appropriations Act, and (3) that Gateway's representations in response to the Solicitation were false and were known to the officials of GSA to be false when they arbitrarily, capriciously and unlawfully accepted Gateway's bid. Because the case was dismissed

for lack of standing none of these issues were decided by the district court.[4]

The Government's Position

On appeal the Government advances three arguments. First, it urges that congressional action since the award to Gateway has rendered this case moot. Next it urges that the district court correctly ruled that Merriam lacked standing. Finally, it urges that no statute has been violated by the award or would be violated by the proposed lease.

The Mootness Contention

On July 13, 1972, Congress passed an appropriations act for certain independent agencies, including the GSA, for the fiscal year ending June 30, 1973. Pub. L. No. 92-351, 86 Stat. 471. If the building is finished before June 30, 1973, that act will apply to the initial rental payments. The 1973 appropriations act, like that of the year before, Pub. L. No. 92-49, 85 Stat. 108, omits the lease-construction prohibition upon which Merriam relies. This, the Government urges, makes Merriam's case moot, because the prohibition against payments contained in the Independent Offices Appropriations Acts for the previous nine years ceased prior to the execution of the Gateway lease.

The Government's contention must be read, however, in the light of another congressional action. In June of 1972, prior to the passage of the 1973 appropriations act on which the Government relies, Congress passed the Public Buildings Amendments of 1972. Pub. L. No. 92-313, 86 Stat. 216. Prior to these amendments, the Public Buildings Act of 1959, 40 U.S.C. §§601-615, had provided that in order to insure equitable distribution of public buildings through-

4. The district court does mention that in the event of a decision requiring new bidding, if Gateway is permitted to rebid, the Government's strong preference for Gateway's site over that of Merriam would dictate its choice. Merriam, on the other hand, contends that Gateway should be disqualified from bidding because of its alleged fraud.

amount in controversy requirement of 28 U.S.C. §1331(a). The court recognized, as well, that the complaint set forth a present controversy arising under a law of the United States. It held, however, that in addition to a genuine controversy arising under the laws of the United States, pressed by a party asserting injury in fact to him, there was a separate standing requirement. Such standing, the court held, must be conferred by some federal statute which brings the party asserting the injury in fact within a protected zone of interest. The district court, in short, applied to the unsuccessful bidder on a federal contract the requirement that he be a Hohfeldian plaintiff. *See* W. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning I & II*, 23 Yale L. J. 16 (1913), 26 Yale L. J. 710 (1917). It found no federal statute conferring a right of action. Therefore it dismissed the complaint. Chief reliance was placed upon *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940) and *Tennessee Electric Power Co. v. T.V.A.*, 306 U.S. 118, 137-38 (1939). Those cases, in turn, hark back to *Frothingham v. Mellon*, 262 U.S. 447 (1923).

In adopting this position, the district court rejected a settled line of authorities in the District of Columbia Circuit recognizing the standing of unsuccessful bidders on federal contracts, to which specific reference will be made shortly. These authorities were rejected on the ground that their analysis of Supreme Court authority since *Perkins v. Lukens Steel Co., supra*, was tacitly rejected by the Court in the recent case of *Sierra Club v. Morton*, 405 U.S. 727 (1972). We hold that Merriam, as a landlord about to lose government tenants and as an unsuccessful bidder, does have standing to seek judicial review of a government contract award.

In *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970) Judge Tamm made an extensive analysis of the issue whether an unsuccessful bidder on a federal government contract had standing to challenge an award. No purpose would be served by burnishing that analysis by repetition. It suffices to point out that he recognizes the

substantial changes made, since the decision in *Perkins v. Lukens Steel Co., supra*, first by the Supreme Court in *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940) and *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1942), and next by Congress when it enacted Section 10 of the Administrative Procedure Act, 5 U.S.C. §702. The holding in *Scanwell* is best set forth by a quotation:

> "The public interest in preventing the granting of contracts through arbitrary or capricious action can properly be vindicated through a suit brought by one who suffers injury as a result of the illegal activity, but the suit itself is brought in the public interest by one acting essentially as a 'private attorney general'." 424 F.2d at 864.

Thus, a bidder who has suffered sufficient injury in fact to meet the case or controversy test of Article III may, in pursuit of a vindication of that injury, assert not only his own rights but those of the public. The District of Columbia Circuit still follows *Scanwell*. *See Constructores Civiles de Centroamerica v. Hannah*, 459 F.2d 1183 (1972); *Wheelabrator Corp. v. Chafee*, 445 F.2d 1306 (D.C. Cir. 1971); *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289 (D.C. Cir. 1971); *Ballerina Pen Co. v. Kunzig*, 433 F.2d 1204 (D.C. Cir. 1970), *cert. denied*, 401 U.S. 950 (1971); *Blackhawk Heating & Plumbing Co. v. Driver*, 433 F.2d 1137 (D.C. Cir. 1970).

Merriam meets the standing test adopted by the District of Columbia Circuit. Assuming for the moment, as the Government contends that both the Independent Offices Appropriations Act and the Public Buildings Amendments of 1972 were designed to protect no zone of interest within which he falls, Merriam may nevertheless assert the public interest provided he has suffered injury in fact. In addition to the destruction of a present and a future potentially profitable relationship with the Government, an injury which the district court acknowledged, Merriam also suffered loss of the costs incurred in preparing and submitting

his proposal. Such an injury has been recognized as compensable by the Court of Claims when an unsuccessful bidder seeks judicial review of an allegedly illegal award in that court. *Keco Industries, Inc. v. United States*, 428 F.2d 1233 (Ct. Cl. 1970). Bid preparation costs are not specifically alleged here, although under 28 U.S.C. §1346 (a)(2) the district court would have jurisdiction to consider such claims if less than $10,000. We mention the possibility of such a claim not to reject the district court's basis for finding the necessary allegation of injury in fact in the loss of a potentially profitable relationship, but to show that Merriam has suffered more than an intangible or speculative loss.

Thus, the district court's reliance, in rejecting Merriam's standing, upon *Sierra Club v. Morton*, *supra* is misplaced. That case is an application of the "injury in fact" test. That test requires "that the party seeking review be himself among the injured." 405 U.S. at 735. The Supreme Court's analysis in *Sierra Club v. Morton* is actually quite similar to that of Judge Tamm in *Scanwell*:

> "Taken together, *Sanders* and *Scripps-Howard* thus established a dual proposition: the fact of economic injury is what gives a person standing to seek judicial review under the statute, but once review is properly invoked, that person may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate." (footnote omitted) 405 U.S. at 737.

Sierra Club v. Morton rejects a construction of the Administrative Procedure Act which would recognize standing to seek judicial review in persons not having a direct stake in the outcome. But it recognizes that those, such as unsuccessful bidders, who do have such a direct stake, may assert not only their own interest, but that of the public at large. The *Sierra Club* holding in no way reflects upon the authorities in the District of Columbia Circuit which recognize the standing of an unsuccessful bidder.

The Government argues, however, that *Scanwell* and the cases following it are inconsistent with *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970) and *Barlow v. Collins*, 397 U.S. 159 (1970). These cases establish a dual test for judicial review of federal agency action. (1) The plaintiff must satisfy Article III by alleging injury in fact; (2) he must also establish that he falls within the zone of interest protected by the statute or regulation upon which he relies. Neither Merriam nor any other unsuccessful bidder, it is urged, can meet the second test, because all of the statutes or regulations with respect to government procurement are intended solely for the protection of the Government, and no one outside the Government falls within their zone of interest.

We do not accept the Government's contention. Government procurement is usually made under the authority of the Armed Services Procurement Act of 1947, 10 U.S.C. §§2301-14 or the Federal Property and Administrative Services Act of 1949, 41 U.S.C. §§251-60. The latter statute applies to GSA. 41 U.S.C. §252(a)(1). It sets forth procurement procedures both for contracts made after advertising for bids and for negotiated contracts. In this case the GSA advertised for bids. 41 U.S.C. §253 provides:

> "Whenever advertising is required—
> (a) The advertisement for bids shall be made a sufficient time previous to the purchase or contract, and specifications and invitations for bids shall permit such full and free competition as is consistent with the procurement of types of property and services necessary to meet the requirements of the agency concerned. . . .
> (b) All bids shall be publicly opened at the time and place stated in the advertisement. Award shall be made with reasonable promptness by written notice to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered:

> *Provided*, That all bids may be rejected when the agency head determines that it is in the public interest so to do."[5]

Accord, 10 U.S.C. §2305(c), applicable to military procurement. It is noteworthy that 41 U.S.C. §253(b) permits the rejection of all bids in the public interest, and permits the acceptance of any bid conforming to the invitation to bids found to be most advantageous to the Government, *but does not permit the acceptance of a bid not conforming to the invitation to bids*. This is consistent with the announced policy in 41 U.S.C. §253(a) of drawing specifications and invitations which shall permit full and free competition. Patently the statute protects not only the Government's interest in securing advantageous contracts, but also the interests of those responding to the Government's invitation to do business with it.[6] Merriam, as a bidder, is within the zone of interest protected by the applicable procurement statute. *See Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970); *Superior Oil Co. v. Udall*, 409 F.2d 1115 (D.C. Cir. 1969).[7]

---

5. There is nothing in the legislative history of this provision which indicates that "property" does not include rental space. Originally the statute said "supplies", but this was changed by the 1952 amendments to the Federal Property and Administrative Services Act of 1949. Act of July 12, 1952, ch. 703, §1(m), 66 Stat. 594; Sen. Rep. No. 2075, 1952 U.S. Code Cong. & Ad. News, 82d Cong. 2d Sess. 2121.

6. *But see* Lind v. Staats, 289 F.Supp. 182 (N.D. Cal. 1968).

7. Even assuming that Merriam did not fall within a zone of interest protected by 41 U.S.C. §253, we would be inclined to hold that his standing as a litigant should nevertheless be recognized. In a Hohfeldian sense a legal right can have its origin elsewhere than in a statute. When the Government solicits proposals to which bidders in good faith take the trouble to respond, the actual relationship between solicitor and bidder is not the same as before. The bidder has placed in the hands of the representatives of the Government the power to bind him to a contract. It is not too much to find a correlative obligation of fair dealing within the terms of the solicitation; an obligation sufficient to confer standing to enforce that obligation.

Any doubt that Congress intended that bidders be included within the zone of interest of the procurement statutes may be resolved, we think, by the interpretation of these statutes made by the General Accounting Office. That office is the agent of Congress in policing governmental expenditures. It has adopted regulations which expressly recognize the standing of unsuccessful bidders to challenge an award. 4 C.F.R. §§20.1-20.12. Indeed, the very solicitation here in issue was the subject of a proceeding in the General Accounting Office. No statute has made the GAO remedy exclusive, or its determination final. *Cf.* 5 U.S.C. §§551 et seq. It would be anomalous indeed if the courts declined to recognize the same zone of interest recognized by the General Accounting Office, the congressional agent. Whatever justification there may be for imposing, in addition to the case or controversy requirements of Article III, a zone of interest requirement for standing to seek judicial review of agency action, must be found in some notion of separation of powers. When the congressional agent interprets the governing procurement statutes as permitting review of executive agency action the separation of powers justification does not apply. There is, of course, the issue of harmful injunctive interference with executive branch decisions. But that problem is not one of standing, but of balancing the equities. *See Page Communications Engineers, Inc. v. Resor*, No. 24,784 (D.C. Cir., Dec. 4, 1970). There is, too, the issue of appropriate standards for judicial review of government contracting decisions. But again, that problem is not one of standing, but of developing standards of review for the varying factual situations likely to be presented. *See A. G. Schoonmaker Co. v. Resor*, 445 F.2d 726 (D.C. Cir. 1971); Note, *Judicial Review and Remedies for the Unsuccessful Bidder on Federal Government Contracts*, 47 N.Y.U.L. Rev. 496 (1972). On the record before us neither issue is presented.

One other point should be mentioned. Merriam alleged injury not only to a prospective but to a present advantageous relationship with the Government. Some cases have recognized that such an existing relationship is suffi-

cient to supply the missing "legal right" element thought to be necessary, in addition to injury in fact, before an unsuccessful bidder's standing would be recognized. *See Gonzalez v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964); *Copper Plumbing & Heating Co. v. Campbell*, 290 F.2d 368 (D.C. Cir. 1961). On this basis, too, Merriam may be considered to have met any dual test for standing which may be applicable.

We hold, then, that the district court erred in dismissing Merriam's claim for lack of standing.

The Merits of the Claim

On this appeal the Government briefed only mootness and standing. At oral argument, however, government counsel urged that the district court judgment should be affirmed because it was in any event entitled to summary judgment. This contention was based upon the assertion that neither the Independent Offices Appropriations Act, 1971 nor the Public Buildings Amendments of 1972 applied to the disputed lease. We have referred above to the legislative background of both statutes. The Government's point with respect to the Independent Offices Appropriations Act is that since the lease with Gateway has not yet been executed and that statute has expired, execution of the lease now could not be a violation. Its point with respect to the Public Buildings Amendments of 1972 is that that statute was not intended to have retroactive application, either to leases already signed, or to agreements to make leases entered into prior to its effective date.

This sophisticated analysis, whereby the Gateway lease would simply slip through the cracks between the two statutes, misses the thrust of Merriam's complaint. When GSA prepared its solicitation for bids it said that the Independent Offices Appropriations Act applied, and that before approval of a lease for a new building could be made without congressional approval the offeror must meet five specified criteria. The award to Gateway is objected to not only because the lease was not submitted to Congress for

approval, but also because the award without such approval is to a bidder who did not meet the advertised specifications. There is, as well, his contention that the award was fraudulent. The expiration of the Independent Offices Appropriations Act simply cannot cure the agency's disregard of its own advertised specifications, or dispose of the fraud allegation. Thus, in rejecting the Government's contention that it is entitled to summary judgment, we need not pass upon its sophisticated but dubious interpretation of the two statutes.

Finally, the Government urges that the proceeding before the General Accounting Office forecloses relief. As we pointed out above, that office ruled that Gateway did not meet the advertised specifications, but said it would not apply its ruling to existing leases. All that was before the district court, and all that is before us, is the text of the March 17, 1972 ruling by the General Accounting Office. The record of that agency is not before us. There is no way of telling, for example, whether the General Accounting Office was aware that the Government had agreed, in this case, that it would not execute the Gateway lease until construction was completed, thereby avoiding a decision on Merriam's preliminary injunction application. Certainly the present record is not ripe for summary judgment as to the propriety of the General Accounting Office ruling in such circumstances.

Moreover, it is the action of GSA of which Merriam seeks judicial review. In this recently developing area of law it is not yet clear what precise role the General Accounting Office will be held to play. *See Wheelabrator Corp. v. Chafee*, *supra*, at 1313-17. Possibly it will ultimately be found appropriate to impose on top of the procurement agency's procedures a rule requiring exhaustion of administrative remedies available in the General Accounting Office.[8] Such a rule would postpone final judicial review

8. In the cases permitting suit, exhaustion of such administrative remedies has been disposed of by considering them inadequate or by deeming them essentially exhausted already. *See* 3 Gov't Cont. Rep. ¶24,095 at 12,044-45 (1972).

until that agency acted on a bid protest, but might be coupled with the recognition that a federal court could preserve the status quo by a preliminary injunction in an appropriate case in the interim. *Cf.* 29 U.S.C. §160(e). But such issues cannot be decided in a vacuum. The district court's decision dismissing for lack of standing left such a vacuum.

Our holding is limited to these propositions. (1) The case is not moot. (2) The plaintiff has standing to sue. (3) We cannot on the present record grant summary judgment to the Government. The judgment of the district court will be reversed and the cause remanded for further proceedings.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 72-1686

JOHN W. MERRIAM, *Appellant*

v.

ROBERT L. KUNZIG, Administrator, General Services Administration, A. J. SAMPSON, Commissioner, Public Building Service of the General Services Administration, L. M. SHIPP, JR., Assistant Commissioner, Space Management of the General Services Administration and the GENERAL SERVICES ADMINISTRATION of the United States of America

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: VAN DUSEN, GIBBONS and HUNTER, *Circuit Judges*

ORDER AMENDING OPINION

The slip opinion, filed February 16, 1973, is hereby ordered amended so that the first full paragraph on page 18 reads:

> Finally, the Government urges that the proceeding before the General Accounting Office forecloses relief. As we pointed out above, that office ruled that Gateway did not meet the advertised specifications, but said it would not apply its ruling to existing leases. All that was before the district court when its

opinion was prepared was the text of the March 17, 1972 ruling by the General Accounting Office.[8] There is no way of telling, for example, whether the General Accounting Office was aware that the Government had agreed, in this case, that it would not execute the Gateway lease until construction was completed, thereby avoiding a decision on Merriam's preliminary injunction application. Certainly the present record is not ripe for summary judgment by an appellate court as to the propriety of the General Accounting Office ruling in such circumstances.

---

8. The motion for summary judgment was argued on April 21, 1972. On April 25, 1972, after the argument but before the decision, the parties filed a stipulation making the March 17, 1972 ruling a part of the record. The district court opinion was filed on June 26, 1972. On that date a certificate of GAO was filed, to which is attached certain documents on file in that office in the Merriam bid protest procedure. The circumstances of the filing do not appear of record. The certificate does not establish that the documents attached comprise the entire GAO record. The district court opinion makes reference only to documents included in the record up to the date of the stipulation.

And the slip opinion is further ordered amended so that the footnote in the second full paragraph on page 18 numbered 8 is to be renumbered 9.

Dated: April 13, 1973

John J. Gibbons
Circuit Judge

A True Copy :

Teste :

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1686

JOHN W. MERRIAM, *Appellant*

v.

ROBERT L. KUNZIG, Administrator, General Services Administration, A. J. SAMPSON, Commissioner, Public Building Service of the General Services Administration, L. M. SHIPP, JR., Assistant Commissioner, Space Management of the General Services Administration and the GENERAL SERVICES ADMINISTRATION of the United States of America

---

(D. C. Civil Action No. 71-2262)

Present SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN and HUNTER, *Circuit Judges*

C. CLARK HODGSON, JR., Philadelphia, Pa.
Attorney for Appellant

KENT FRIZZELL
Assistant Attorney General
Department of Justice
Washington, D.C. 20530

CARL J. MALONE
United States Attorney
Philadelphia, Pennsylvania 19107

WARREN D. MULLOY
Assistant United States Attorney
Philadelphia, Pennsylvania 19107

> "Patently the statute protects not only the Government's interest in securing advantageous contracts, but also the interests of those responding to the Government's invitation to do business with it. Merriam, as a bidder, is within the zone of interest protected by the applicable procurement statute." *Id.* at 15 (footnotes and citations omitted).

I am not convinced that the plaintiff has satisfactorily demonstrated that *he* or any *interest* or *legal right* of his was intended by Congress to be protected by the statute in question. At the same time, a careful review of the relevant case law has persuaded me that the panel's analysis of the important issues presented in this appeal may lead to uncertainty in an area of the law already too well known for its lack of guidance.

For these reasons, and because of the effect the improper resolution of this second issue may be thought to have upon the role of federal courts in our system of government, I respectfully dissent from the Court's decision not to reconsider *en banc* this important aspect of the present appeal.

In view of the vast literature on the standing doctrine,[3] it would serve little purpose to repeat what others have already said, except to point out that the standing inquiry focuses upon whether the particular plaintiff "has a sufficient personal interest in getting the relief he seeks. . . ."[4] Putting that question to one side,[5] I am

3. *See, e.g.*, Scott, Standing in the Supreme Court—A Functional Analysis, 86 Harv. L. Rev. 645 (1973); Jaffe, Standing Again, 84 Harv. L. Rev. 633 (1971); Davis, The Liberalized Law of Standing, 37 U. Chi. L. Rev. 450 (1970); Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601 (1968); Jaffe, The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff, 116 U. Pa. L. Rev. 1033 (1968).

4. H. Hart & H. Wechsler, The Federal Courts and The Federal System 174 (1953); *see* Flast v. Cohen, 392 U.S. 83, 99-100 (1968): "The question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable."

5. I am not inclined to dissent from the Court's decision not

troubled by the panel's approach to determining whether Congress has revealed any interest in protecting a party such as this plaintiff.

When Congress has not explicitly provided in a given legislative enactment for judicial review of agency action either generally or at the behest of a particular class of litigants (i.e., private individuals), the question may arise whether one seeking to challenge the validity of an agency's action may do so in the courts despite the legislative silence.[6] Although this problem may not logically appear

to reconsider whether the plaintiff has standing in an Article III sense. In addition, because I dissent only from the decision of this Court denying the petition for rehearing en banc, I express at this time no views upon the merits of this case as a whole or upon the panel's *ultimate resolution* of the issue which this dissenting opinion addresses. This dissenting opinion deals only with the *approach* to the overall "standing question" which the panel has taken.

6. *See* Jaffe, *Standing Again*, 84 Harv. L. Rev. 633 (1971). Thus, a distinction must be made between those cases in which judicial review is sought of an act of a governmental agency which Congress has expressly made subject to review in the courts and those cases in which review is sought by means of a general jurisdictional grant. *See* Scott, Standing in the Supreme Court--A Functional Analysis, 86 Harv. L. Rev. 645, 647-48 (1973); *compare, e.g.*, FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940) (statutory review) *with, e.g.*, Barlow v. Collins, 397 U.S. 159 (1970) (non-statutory review). For examples of statutes expressly subjecting agency action to judicial review, *see, e.g.*, Federal Trade Commission Act, 15 U.S.C. §45(c) (1970); Federal Power Act, 16 U.S.C. §825L(b) (1970); Federal Aviation Act, 49 U.S.C. §1486(a) (1970); Interstate Commerce Act, 49 U.S.C. §1(1970); National Labor Relations Act, 29 U.S.C. §160(f) (1970); Securities Act of 1933, 15 U.S.C. §77l(a) (1970); Investment Company Act of 1940, 15 U.S.C. §80a-42(a) (1970); Federal Communications Act, 47 U.S.C. §402(b)(6) (1970). The statutory and non-statutory review situations must be separately analyzed because in the former Congress has expressed a policy that at least under some circumstances the agency's action shall be subject to judicial review, while in the latter a court does not have even that much guidance. In the present case, no relevant statute expressly provides for judicial review, and thus the plaintiff has sued under 28 U.S.C. §1331 (federal question jurisdiction).

to raise a typical standing issue,[7] courts have often sought to resolve it, under the standing rubric, by inquiring whether the plaintiff has a "legally protected interest" or "legal right."[8]

For example, in Tennessee Electric Power Company v. TVA[9] nineteen power companies attempted to attack the constitutional validity of the Tennessee Valley Authority. Despite the financial harm the plaintiffs had suffered, the Supreme Court concluded that they had no *right* derived from either common law or statute to be free from competition. To bring such a suit, the "right invaded [must be] a legal right, — one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."[10] As Justice Frankfurter later explained the doctrine in a different case:

> "A litigant ordinarily has standing to challenge governmental action of a sort that, if taken by a private

7. Courts frequently treat a host of different kinds of problems as raising standing issues. Familiar are cases involving (1) whether the plaintiff has in fact suffered injury, *see* Sierra Club v. Morton, 405 U.S. 727 (1972); Flast v. Cohen, 392 U.S. 83, 94-101 (1968); (2) whether a plaintiff may properly sue on the basis of another person's rights, *see* NAACP v. Alabama, 357 U.S. 449, 458 (1958); Barrows v. Jackson, 346 U.S. 249, 255-59 (1953). The present case, on the other hand, concerns, apart from the Article III "injury in fact" issue, whether the plaintiff can establish the existence of a legal right which the GSA has allegedly violated. If he cannot so demonstrate, dismissal for failure to state a claim or cause of action is a more appropriate judicial response, in my view, than dismissal for lack of standing. The Supreme Court, however, has treated the problem as one of "standing," and, therefore, throughout this opinion, I shall analyze it in the same terms. *See, e.g.*, Investment Co. Institute v. Camp, 401 U.S. 617 (1971); Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970); Perkins v. Lukens Steel, 310 U.S. 113 (1940).

8. *See* Perkins v. Lukens Steel, 310 U.S. 113, 125 (1940); Alabama Power Co. v. Ickes, 302 U.S. 464 (1938).

9. 306 U.S. 118 (1939).

10. *Id.* at 137-38.

> person, would create a right of action cognizable by the courts . . . Or standing may be based on an interest created by the Constitution or a statute. . . . But if no comparable common law right exists and no such constitutional or statutory interest has been created, relief is not available judicially."[11]

Within two years of the *Tennessee Electric Power* decision, the Supreme Court journeyed into the area of determining what a plaintiff must show in order to satisfy the "legally protected interest" test. In FCC v. Sanders Brothers Radio Station,[12] an owner of a radio station sought judicial review of the grant of an operating license to an applicant. The Court held that the section of the Federal Communications Act permitting an appeal by any "person aggrieved or whose interests are adversely affected by any decision of the Commission"[13] provided standing for the plaintiff to challenge the grant of the license to its competitor. The Supreme Court did so, however, only (a) after examining the relevant legislative history[14] and (b) in view of the express provision in the statute for judicial review.

In 1968, the Supreme Court examined standing to challenge agency action in Hardin v. Kentucky Utilities Company.[15] In that case, a private power company sought review of the TVA's expansion of services into the complainant's market area by alleging that such expansion violated a statute.[16] Although the Tennessee Valley Au-

---

11. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 152-53 (Frankfurter, J., concurring).

12. 309 U.S. 470 (1940).

13. 47 U.S.C. §402(b) (1964). It should be noted that in view of this provision *Sanders* should be analyzed as a statutory review case. *See* note 6, *supra*.

14. 309 U.S. at 476-77.

15. 390 U.S. 1 (1968).

16. Tennessee Valley Authority Act of 1933 §15d(a), 16 U.S.C. §831n-4(a) (1964); *see* U.S. at 3 n. 1.

thority Act contains no express provision for judicial review, the Supreme Court inspected the legislative history in order to determine whether the plaintiff could rely upon implied protection from the regulatory statute.[17] Inferring from the legislative history that the "primary purpose" of the statute was to benefit the plaintiff's interest, the Court held that such implicit congressional intent justified judicial review.

The Supreme Court has even more recently probed the requisites for judicial review of agency action. In Association of Data Processing Service Organizations v. Camp,[18] the Comptroller of the Currency issued a ruling permitting national banks to provide data-processing service to their customers. An association of companies offering computer services throughout the country filed suit challenging the ruling on the ground that the National Banking Act gives national banks only such "incidental powers as shall be necessary to carry on the business of banking. . . ."[19]

Examining the standing issue in two parts, the Supreme Court first concluded that the petitioners had suffered "injury in fact."[20] In the second part of its standing analysis, the Court proceeded to determine "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute . . . in question."[21] Quoting from a First Circuit opinion[22] that discussed the legislative history and purpose of §4 of the Bank Service

17. 390 U.S. at 6-7.

18. 397 U.S. 150 (1970). For additional recent cases on the subject, see Investment Co. Institute v. Camp, 401 U.S. 617 (1971); Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970) (per curiam); Barlow v. Collins, 397 U.S. 159 (1970); Flast v. Cohen, 392 U.S. 83 (1968).

19. 12 U.S.C. §24 (seventh) (1970).

20. 397 U.S. at 152.

21. *Id.* at 153.

22. *Id.* at 155, quoting Arnold Tours, Inc. v. Camp, 408 F.2d 1147, 1153 (1st Cir. 1969).

Corporation Act of 1962, prohibiting bank service corporations from engaging "in any activity other than the performance of bank services for banks,"[23] the Supreme Court held that "§4 arguably brings a competitor within the zone of interests protected by it."[24]

The critical issue which this dissent addresses is essentially the same as the question presented in the cases discussed above: whether Congress, in enacting the statute or statutes involved, intended them to protect the interest asserted by the particular litigant in each case.[25] Placed in the factual setting of this appeal, that question becomes whether Congress intended to provide one seeking a government contract with judicial recourse when an alleged violation of that asserted interest by a federal administrative agency is set forth in a claim for judicial relief.

In grappling with this problem, it is not sufficient to hold merely that the plaintiff has standing to sue, since that holding may, in effect, say only that he has been injured in fact by the agency action of which he complains.[26] Rather, the Court must at some point, if the result reached

---

23. 12 U.S.C. §1864 (1970).

24. 397 U.S. at 156. The Court went on to discuss "whether judicial review of the Comptroller's action has been precluded," *id.* and held that it had not. *Id.* at 157. Justice Brennan disagreed with the *Data Processing* majority's approach to the standing question, arguing that a plaintiff has standing if he has suffered "injury in fact," the Article III test. *See* Barlow v. Collins, 397 U.S. 159, 168 (1970) (Brennan, J., concurring and dissenting). He would treat the reviewability of agency action question as a totally separate inquiry. *Id.* at 173.

25. *Compare* Investment Co. Institute v. Camp, 401 U.S. 617, 640 (Harlan, J., dissenting); Barlow v. Collins, 397 U.S. 159, 174-75 (1970) (Brennan, J., concurring and dissenting).

26. *Compare* Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970) (two-pronged standing test) *with* Barlow v. Collins, 397 U.S. 158, 170-73 (1970) (Brennan, J., concurring and dissenting) (Article III standing test) *and* Flast v. Cohen, 392 U.S. 83, 99-100 (1968).

is to conform to the tests fashioned by the Supreme Court, also hold that the plaintiff is protected by the statute in question, as illuminated by its legislative history, and that the statute permits him to seek judicial relief. Put simply, it is not enough for a plaintiff to come to a federal court and claim that he has been injured by action taken by a federal agency. Instead, he must also demonstrate that he has a cause of action to redress such injury—that he has a *right, enforceable in the federal courts*, not to be harmed by the agency's allegedly unlawful action.

As quoted above, *supra* p. 3, the panel states, and indeed holds, that Congress did intend for a private party, allegedly aggrieved by the action of the GSA, to be heard by a federal district court. What concerns me about such conclusion is that it is little more than just that—a conclusion not shown to be based, at least so far as the opinion reveals, upon the underlying purposes or legislative history of the statute.[27] In order to draw the inference that Congress intended for this kind of case to be heard by a federal court, I believe something more must be developed than the mere fact that the statute prohibits what the agency has allegedly done. What the panel has said still does not adequately answer the question whether Congress intended to protect those, who like the plaintiff, are disappointed in not receiving a government contract, and to

27. Although the Supreme Court may search for only slight evidence that Congress intended to protect a plaintiff's interests, it at least looks for some indicia. *See* Associated Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 155 (1970); Hardin v. Kentucky Utilities Co., 390 U.S. 1 (1968). The Court of Appeals for the District of Columbia Circuit, which permits judicial review for those seeking to do business with the government, has done so only after examining the legislative history and purpose of the relevant statutes involved in each case. *See* Constructores Civiles de Centroamerica, S. A. v. Hannah, 459 F.2d 1183 (D. C. Cir. 1972); Ballerina Pen Co. v. Kunzig, 433 F.2d 1204 (D. C. Cir. 1970), *cert. denied*, 401 U.S. 930 (1971); Scanwell Laboratories v. Schaffer, 424 F.2d 859 (D. C. Cir. 1970).

provide them with a private right of action in the district court.

To shirk the process of ascertaining legislative intent when a statute is silent, or at most ambiguous, under the empire of a belief that the result sought is beneficent, may prove unfruitful in the fullness of time.

In addition, I believe it appropriate to note that footnote 7 of the panel's opinion creates, at least for me, considerable conceptual misgivings. As developed above, in my view the plaintiff can properly sue, in the circumstances of this case, only if he can show that he has a cause of action under the statute in question. Suggesting that the Court might hold that, even assuming he is not within the zone of interest Congress intended to protect, he will be permitted to sue in any event seems to indicate that the Court is no longer following the standards laid down by the Supreme Court.[28] This step—constituting a considerable modification of the standards established by the Supreme Court—should be taken, if at all, only by the Court *en banc*.

While I agree that "[i]n a Hohfeldian sense a legal right can have its origin elsewhere than in a statute,"[29] I perceive nothing in this case from which such a right can arise. True, as that footnote indicates, the government, if it receives a bid, does have the *power* to bind the bidder to a contract. Under Professor Hohfeld's analysis, however,

28. *Id.*; *see* also Barlow v. Collins, 397 U.S. 159, 174-75 (Brennan, J., concurring and dissenting).

29. Slip op. at 15 n. 7. It should be noted that others, discussing the question whether to have standing a plaintiff must have Hohfeldian status, have done so only in the context of examining the minimum Article III standards. *See* Jaffe, The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff, 116 U. Pa. L. Rev. 1033 (1968). In a similar vein, Professor Scott has recently urged courts, while expanding "access standing," not to over-liberalize the standards for "decision standing." Scott, Standing in the Supreme Court—A Functional Analysis, 86 Harv. L. Rev. 645 (1973).

a *duty* is correlative to a *right*, not to a power. Imposing upon the government a *duty of fair dealing* must, then, have been suggested by the panel as a matter of *policy*. While such a policy may well be wise, it is not, in my view, one which a federal court should impose *sua sponte* at least without guidance from Congress, and certainly not one for us to erect simply in order to provide disappointed contractors with a federal cause of action.

During the last few years the federal courts have experienced an extraordinary increase in volume far more than what ought to have been expected from population growth alone.[30] As Chief Judge Friendly has recently indicated in his excellent treatise on federal jurisdiction,[31] it may be that, if federal courts are to handle best the tasks most appropriately given them, a solution must be sought not by creating more judgeships, but by slowing up judicial intake and certainly not by staking out additional areas of jurisdiction without very careful consideration. Apropos the present case, Chief Judge Friendly has said: "One need only consider the explosion of litigation under the SEC's Rule 10b-5, the proxy rules, and the new sections dealing with tender offers . . . to realize the impact that any such regulatory law can have once a right of private action is implied."[32]

Jurisdictional questions, like the one posed in this case, treated in isolation from the judicial system to which they relate, become, perhaps, sterile formalisms. But such underlying questions are matters of substance in the working of our federal system and in the effective conduct of the business of the courts.[33]

30. H. Friendly, Federal Jurisdiction: A General View 16 (Columbia Univ. Press 1973).

31. *Id.*

32. *Id.* at 110-11.

33. After a most exhaustive and scholarly functional treatment of the standing doctrine, Professor Scott concludes that:

". . . a predictable reaction [to the wholesale opening of federal court doors] will be a much stronger tendency for

I am apprehensive that the effect of the panel's opinion may well be to deluge the federal courts with a host of grievances by disappointed contractors and perhaps by myriad other litigants allegedly injured by agency action they claim is in violation of some statute or rule. The Court should not lightly ascribe to Congress the intention to open new vistas of judicial review. And this, in my judgment, is precisely what the Court has done in this case.

For the above reasons, I dissent from the Court's decision not to reconsider this case en banc.

Congress to enact a variety of preclusion provisions. The ultimate result of this kind of process is to push us to more all-or-nothing choices when it comes to judicial review, and that seems inherently undesirable. . .

. . . . . .

". . . But it would be regrettable if the erosion of access standing were thought to carry with it an automatic expansion of the policymaking role of the courts, for in that event the doors of the courts might come to be closed more often, not by judicial abdication, but by legislative fiat." Scott, Standing in the Supreme Court—A Functional Analysis, 86 Harv. L. Rev. 645, 689-90 (1973).

A True Copy :

Teste :

Clerk of the United States Court of Appeals for the Third Circuit.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN W. MERRIAM — Civil Action

v.

ROBERT L. KUNZIG, Administrator,
General Services Administration,
A. J. SAMPSON, Commissioner,
Public Building Service of the
General Services Administration,
L. M. SHIPP, JR., Assistant Commissioner, Space Management of the
General Services Administration and
the GENERAL SERVICES ADMINISTRATION
of the United States of America

Filed:
June 29, 1973

ORDER

AND NOW, to wit, this 28th day of June, 1973, it is hereby ORDERED that Gateway Center Corporation be permitted to intervene as a party Defendant in this action.

BY THE COURT:

J.

DATED:

APPENDIX III

GENERAL SERVICES ADMINISTRATION
Region 2
PUBLIC BUILDINGS SERVICE
26 Federal Plaza, New York, N.Y. 10007

SOLICITATION FOR OFFERS

Date: September 30, 1970 Solicitation No. Negt(70)-63

PHILADELPHIA, PENNSYLVANIA

Offers are solicitated under Section 302(c) (10) of the Federal Property and Administrative Services Act of 1949 (63 Stat. 377), as amended, for the leasing of 14,000 net usable square feet of office, storage and related space in accordance with the instructions, schedules and attachment listed:

Schedules A, B, C and D.
Exhibit I.
Addendum to Schedule D
Addendum to Schedule A

Date of Possession: July 1, 1972.

Offers will be received until 1:30 PM (time) October 13, 1970 (Date)

There will be no public opening and all offers will be kept strictly confidential until a contract has been awarded.

The Government shall have a minimum of 90 days from last day offers are received to make an award.

4. *NOTICE TO OFFERORS.* Offerors should carefully read all parts of the solicitation including these instructions, all schedules and attachments, the proposal form and general provisions as contained in the lease form.

5. *PREPARATION OF OFFERS.*

A. Offerors shall supply all data required on GSA Form 1364.

B. Erasures on or changes to the forms must be initialed by the person signing the offer.

C. Offers submitted by agents, attorneys, trustees, executors, or corporate officials shall be accompanied by an attested certificate of authority to submit the offer and to bind the principal to execute any resultant lease and deliver the premises.

6. *WITHDRAWAL OF OFFERS.* Offers may be withdrawn on written or telegraphic request received from the offerors at the address shown on the solicitation prior to the closing time for receipt of offers.

7. *DEVIATIONS.* Offers will be construed to be in full and complete compliance with the terms, provisions and specifications of the solicitation, unless the offeror clearly describes any deviation therefrom in the offer.

8. *OPENING OF OFFERS.* There will be no public opening and all offers will be kept strictly confidential until a contract has been awarded.

9. *FINALITY OF ACCEPTANCE.* The unconditional acceptance of an offer received in response to the solicitation establishes a valid contract extending to all covenants of the solicitation, offer, and acceptance, between the offeror and the government.

GENERAL PROVISIONS AND INSTRUCTIONS
U.S. GOVERNMENT LEASE FOR REAL PROPERTY

1. *SUBLETTING THE PREMISES.*

The Government may sublet any part of the premises but shall not be relieved from any obligations under this lease by reason of any such subletting.

2. *MAINTENANCE OF PREMISES.*

The Lessor shall maintain the demised premises, including the building and any and all equipment, fixtures, and appurtenances, furnished by the Lessor under this lease in good repair and tenantable condition, except in case of damage arising from the act or the negligence of the Government's agents or employees. For the purpose of so maintaining said premises and property, the Lessor may at reasonable times, and with the approval of the authorized Government representative in charge, enter and inspect the same and make any necessary repairs thereto.

3. *DAMAGE BY FIRE OR OTHER CASUALTY.*

If the said premises be destroyed by fire or other casualty this lease shall immediately terminate. In case of partial destruction or damage, so as to render the premises untenantable, as determined by the Government, the Government may terminate the lease by giving written notice to the Lessor within fifteen (15) days thereafter, if so terminated no rent shall accrue to the Lessor after such partial destruction or damage, and if not so terminated the rent shall be reduced proportionately by supplemental agreement hereto effective from the date of such partial destruction or damage.

4. *ALTERATIONS.*

The Government shall have the right during the [illegible] ence of this lease to make alterations, attach fixtures and erect additions, structures or signs in or upon the premises hereby leased, which fixtures, additions or structures so placed in, upon or attached to the said premises shall be and remain the property of the Government and may be removed or otherwise disposed of by the Government.

5. *CONDITION REPORT.*

A joint physical survey and inspection report of the demised premises shall be made as of the effective date of this lease, reflecting the then present condition, and will be signed on behalf of the parties hereto.

6. *COVENANT AGAINST CONTINGENT FEES.*

The Lessor warrants that no person or selling agency has been employed or retained to solicit or secure this lease upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Lessor for the purpose of securing business. For breach or violation of this warranty the Government shall have the right to annul this lease without liability or in its discretion to deduct from the rental price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee. (Licensed real estate agents or brokers having listings on property for rent, in accordance with general business practice, and who have not obtained such licenses for the sole purpose of effecting this lease, may be considered as bona fide employees or agencies within the exception contained in this clause.)

7. *OFFICIALS NOT TO BENEFIT.*

No Member of or Delegate to Congress, or Resident Commissioner shall be admitted to any share or part of this lease contract, or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this lease contract if made with a corporation for its general benefit.

8. *ASSIGNMENT OF CLAIMS.*

Pursuant to the provisions of the Assignment of Claims Act of 1940, as amended (31 U.S.C. 263, 41 U.S.C. 15), if this lease provides for payments aggregating $1,000 or more, claims for monies due or to become due the Lessor from the Government under this contract may be assigned to a bank, trust company, or other financing institution, including any Federal lending agency, and may thereafter be further assigned or reassigned to any such institution. Any such assignment or reassignment shall cover all amounts payable under this contract and not already paid, and shall not be made to more than one party, except that any such assignment or reassignment may be made to one party as agent or trustee for two or more parties participating in such financing. Notwithstanding any provisions of this contract, payments to an assignee of any monies due or to become due under this contract shall not, to the extent provided in said Act, as amended, be subject to reduction or set-off.

9. *EQUAL OPPORTUNITY CLAUSE. (See attached Amendment.*

10. *FACILITIES NONDISCRIMINATION.*

(a) As used in this section, the term "facility" means stores, shops, restaurants, cafeterias, restrooms, and any other facility of a public nature in the building in which the space covered by this lease is located.

(b) The Lessor agrees that he will not discriminate by segregation or otherwise against any person or persons because of race, creed, color, or national origin in furnishing, or by refusing to furnish, to such person or persons the use of any facility, including any and all services, privileges, accommodations, and activities provided thereby. Nothing herein shall require the furnishing to the general public of the use of any facility customarily furnished by the Lessor solely to tenants, their employees, customers, patients, clients, guests and invitees.

(c) It is agreed that the Lessor's noncompliance with the provisions of this section shall constitute a material breach of this lease. In the event of such noncompliance, the Government may take appropriate action to enforce compliance; may terminate this lease, or may pursue such other remedies as may be provided by law. In the event of termination, the Lessor shall be liable for all excess costs of the Government in acquiring substitute space, including but not limited to the cost of moving to such space. Substitute space shall be obtained in as close proximity to the Lessor's building as is feasible and moving costs will be limited to the actual expenses thereof as incurred.

(d) It is further agreed that from and after the date hereof the Lessor will, at such time as any agreement is to be entered into or a concession is to be permitted to operate, include or require the inclusion of the foregoing provisions of this section in every such agreement or concession pursuant to which any person other than the Lessor operates or has the right to operate any facility. Nothing herein contained, however, shall be deemed to require the Lessor to include or require the inclusion of the foregoing provisions of this section in any existing agreement or concession arrangement or one in which the contracting party other than the Lessor has the unilateral right to renew or extend the agreement or arrangement, until the expiration of the existing agreement or arrangement and the unilateral right to renew or extend.

The Lessor also agrees that it will take any and all lawful actions as expeditiously as possible, with respect to any such agreement as the contracting agency may direct, as a means of enforcing the intent of this section, including, but not limited to, termination of the agreement or concession and institution of court action.

11. *EXAMINATION OF RECORDS.*

(NOTE:—This provision is applicable if this lease was negotiated without advertising.)

(a) The Lessor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of 3 years after final payment under this lease, have access to and the right to examine any directly pertinent books, documents, papers, and records of the Lessor involving transactions related to this lease.

(b) The Lessor further agrees to in all his subcontracts hereunder a provision to the effect that the subcontractor agrees that the Comptroller General of the United States or his representative shall, until the expiration of 3 years after final payment under this lease with the Government, have access to and the right to examine any directly pertinent books, documents, papers, and records of such subcontractor involving transactions related to the subcontract.

12. *APPLICABLE CODES AND ORDINANCES.*

The Lessor, as part of the rental consideration, agrees to comply with all codes and ordinances applicable to the ownership and operation of the building in which the leased space is situated and, at his own expense, to obtain all necessary permits and related items.

13. *INSPECTION.*

At all times after receipt of Bids, prior to or after acceptance of any Bid or during any construction, remodelling or renovation work, the premises and the building or any parts thereof, upon reasonable and proper notice, shall be accessible for inspection by the Contracting Officer, or by architects, engineers, or other technicians representing him, to determine whether the essential requirements of the solicitation or the lease requirements are met.

14. *ECONOMY ACT LIMITATION.*

If the rental specified in this lease exceeds $2,000 per annum, the limitation of Section 322 of the Economy Act of 1932, as amended (40 U.S.C. 278a), shall apply.

15. *FAILURE IN PERFORMANCE.*

In the event of failure by the Lessor to provide any service, utility, maintenance or repairs required under this lease, the Government shall have the right to secure said services, utilities, maintenance or repairs and to deduct the cost thereof from rental payments.

16. *LESSOR'S SUCCESSORS.*

The terms and provisions of this lease and the conditions herein shall bind the Lessor, and the Lessor's heirs, executors, administrators, successors, and assigns.

17. *INSTRUCTIONS.*

(a) Whenever the lease is executed by an attorney, agent, or trustee on behalf of the Lessor, two authenticated copies of his power of attorney, or other evidence to act on behalf of the Lessor, shall accompany the lease.

(b) When the Lessor is a partnership, the names of the partners composing the firm shall be stated in the body of the lease. The lease shall be signed with the partnership name, followed by the name of the partner signing the same.

(c) Where the Lessor is a corporation, the lease shall be signed with the corporate name, followed by the signature and title of the officer or other person signing the lease on its behalf, duly attested, and, if requested by the Government evidence of this authority so to act shall be furnished.

(d) When deletions or other alterations are made specific notation thereof shall be entered under clause 9 of the lease before signing.

(e) If the property leased is located in a State requiring the recording of leases, the Lessor shall comply with all such statutory requirements at Lessor's expense.

The Equal Opportunity clause contained in Paragraph 9 of the General Provisions and Instructions (SF 2-A) is deleted and the following is substituted in lieu thereof:

During the performance of this contract, the Contractor agrees as follows:

(a) The Contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin. The Contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin. Such action shall include, but not be limited to, the following: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprentice-

ship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Contracting Officer setting forth the provisions of this Equal Opportunity clause.

(b) The Contractor will, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex or national origin.

(c) The Contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency Contracting Officer, advising the labor union or workers' representative of the Contractor's commitments under this Equal Opportunity clause, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(d) The Contractor will comply with all provisions of Executive Order No. 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(e) The Contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(f) In the event of the Contractor's noncompliance with the Equal Opportunity clause of this contract or with any of the said rules, regulations, or orders, this contract may be canceled, terminated, or suspended, in whole or in part, and the Contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Execu-

tive Order No. 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(g) The Contractor will include the provisions of paragraphs (a) through (g) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order No. 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The Contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions, including sanctions for noncompliance: Provided, however, That in the event the Contractor becomes involved in or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the Contractor may request the United States to enter into such litigation to protect the interests of the United States.

Also, the said Standard Form 2-A is amended to include the following provision:

Certification of nonsegregated facilities. (Applicable to contracts, subcontracts, includes Government contracts and subcontracts, and agreements with applicants who are themselves performing federally assisted construction contracts, exceeding $10,000 which are not exempt from the provisions of the Equal Opportunity clause.)

By the submission of this bid, the bidder, offeror, applicant, or subcontractor certifies that he does not maintain or provide for his employees any segregated facilities at any of his establishments, and that he does not permit his employees to perform their services at any location, under

his control, where segregated facilities are maintained. He certifies further that he will not maintain or provide for his employees, any segregated facilities at any of his establishments, and that he will not permit his employees to perform their services at any location, under his control, where segregated facilities are maintained. *The bidder, offeror, applicant; or subcontractor* agrees that a breach of this certification is a violation of the Equal Opportunity clause in this contract. As used in this certification, the term "segregated facilities" means any waiting rooms, work areas, rest rooms and wash rooms, restaurants and other eating areas, time clocks, locker rooms and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing facilities provided for employees which are segregated by explicit directive or are in fact segregated on the basis of race, color, religion, sex or national origin, because of habit, local custom, or otherwise. He further agrees that (except where he has obtained identical certifications from proposed subcontractors for specific time periods) he will obtain identical certifications from proposed subcontractors prior to the award of subcontracts exceeding $10,000 which are not exempt from the provisions of the Equal Opportunity clause; that he will retain such certifications in his files; and that he will forward the following notice to such proposed subcontractors (except where the proposed subcontractors have submitted identical certifications for specific time periods):

Notice to prospective subcontractors of requirement for certifications of nonsegregated facilities.

A Certification of Nonsegregated Facilities, as required by the May 9, 1967 order (32 F.R. 7439, May 19, 1967) on Elimination of Segregated Facilities, by the Secretary of Labor, must be submitted prior to the award of a subcontract exceeding $10,000 which is not exempt from the

provisions of the Equal Opportunity clause. The certification may be submitted either for each subcontract or for all subcontracts during a period (i.e., quarterly, semiannually, or annually).

NOTE: The penalty for making false statements in offers is prescribed in 18 U.S.C. 1001.

(1) Office subdividing partitions as required above must be installed complete with 36″ doors and hardware. Minimum partition type; demountable with all metal components or a combination of metal gypsum wall board components with a minimum sound transmission class of 35. (See Schedule B, Part II, Paragraph 6b(1)). Upon request of the contracting officer, certification as to the minimum sound transmission rating by a registered professional engineer or by the manufacturer must be supplied by the successful offeror, at his own expense, if required by the Government.

(2) Bank-type partitions shall be flush type with lower panel 1⅝″ thick with a plus tolerance of ⅛″ and a minus tolerance of 3/16″, and approximately 5′7″ high and shall consist of movable and interchangeable hollow metal insulated panels and post construction with upper plate glass panels. Posts shall be 1¾″ square. The panels shall be uniform widths. The bottom of each panel shall be approximately 6″ clear of the floor and have recessed space for electric wiring for exterior attachment, including spring clip holder for the wire.

NOTE: Offerors are requested to state on GSA Form 1364, or attachment thereto, the cost per linear foot of office subdividing partitioning or bank-type partitioning furnished in excess of or less than that required to provide for the 1 to 10 ratio as specified above. The Government will make a lump sum payment for partitioning furnished in excess of the specified ratio and will take credit from the rental payments for partitioning not furnished by the Lessor where the amount furnished is less than the specified ratio.

6. *Offer Acceptance Period*—90 days.

7. *Escalator Clauses:* The following escaltor clauses and these only will be acceptable to the Government and included in the lease.

Tax Excalation:

At the end of the first five (5) years, first ten (10) years, first fifteen (15) years, first twenty (20) years and at the end of the first twenty-five (25) years of Government occupancy under the lease the annual rental rate will be adjusted to provide for increases or decreases in general real estate taxes. The tax adjustment amount shall be 100% percent of the increase or decrease of the total taxes to be paid on facility entirely occupied by the Government, and the total rental, including any such adjustment, shall not exceed the limitation imposed by Section 322 of the Economy Act of June 30, 1932, as amended (40 U.S.C. 278a). The base from which adjustments will be made will be calculated from the assessment, assessment ratio and tax rate in effect during the fifth, tenth, and fifteenth, twentieth, and twenty-fifth year respectively, of occupancy, as compared to the first full assessment, assessment ratio and tax rate in effect during the first year of the lease. Neither the tax base nor the adjustment shall include any fine, penalty, interest or cost added thereto for nonpayment or for delay in payment beyond any discount period. In the event the first, fifth, tenth, fifteenth, twentieth, or twenty-fifth year of occupancy does not coincide with a tax year, the base will be established by pro-rating the tax periods involved.

Proof of the amount of tax and evidence of payment will be furnished by the Lessor and the rental adjustment by reason of tax increases or decreases shall be accomplished by increasing or decreasing the next monthly rental check in the appropriate amount.

The Lessor shall furnish the Government copies of all notices which may affect the valuation of said land and building for general real estate taxes thereon. Such copies shall be delivered or mailed within three days from the receipt thereof by the Lessor to the Public Buildings Service, General

Services Administration, Region 2, 26 Federal Plaza, New York, New York 10007. The Government may contest the amount or validity of any valuation for general real estate taxes by appropriate legal proceedings either in the name of the Government or the name of the Lessor or in the names of both. In the event that the Government is precluded from such proceeding, the Lessor, upon reasonable notice and request by the Government, shall contest any such proceeding and in the event of any such request, the Government shall reimburse the Lessor for its costs or expenses in connection with any such contest or proceeding and execute any documents or pleading required for such purposes, provided that the Lessor shall reasonably be satisfied that the facts and data set forth in such documents or pleadings are accurate. If the Lessor receives any refund of taxes, the Lessor shall promptly rebate to the Government the Government's proportionate share thereof. The reimbursement to the Lessor including payment for real estate tax increases must not exceed the amount authorized by Section 322 of the Economy Act of June 30, 1932, as amended (40 U.S.C. 278a.)

Operating Costs Escalation

At the end of the first five (5) years, first ten (10) years, first 15 years, first 20 years and at the end of the first twenty-five (25) years of Government occupancy the annual rental rate will be adjusted (unless the Government elects to take over performance of such services as hereinafter provided) to provide for increases or decreases in the operating cost (see Schedule C) furnished by the Lessor in the Government's leased area as a part of the rental consideration, excluding exterior and structural maintenance and repair, window cleaning, lawn and landscaping maintenance and snow removal. Said operating costs, and the initial base from which adjustments shall be made, consist of electricity, janitorial and cleaning services and supplies; maintenance and repairs of, and or provision for the heating system, airconditioning system, electrical system, elevator system, plumbing system, replacement

of bulbs, tubes, ballasts and starters, interior maintenance, building engineer(s) and/or manager(s) and related staff, and social security tax and workmen's compensation insurance. The base for these costs will be established by the Government at a net usable square foot rate or the average annual cost per square foot per annum, whichever is higher.

The base from which upward or downward adjustments in the rent will be made shall be the "per net usable square foot" costs as above provided or as amended for each five year period. Neither the Operating Costs base nor the adjustment shall include any fines, penalties, interest or cost added thereto for nonpayment or for delay in payment beyond any discount period.

The Operating Costs Escalation will operate in the following manner: At the end of the initial five (5) year period, the Lessor will submit to the General Services Administration average cost per square foot per annum (compiled by taking ⅕ of the total cost for the first five (5) years) for electricity, janitorial and cleaning services and supplies, maintenance and repairs of and/or provision for the heating system, air-conditioning system, electrical system, elevator system, plumbing system, replacement of bulbs, tubes, ballasts and starters, interior maintenance building engineer(s) and related staff and social security and workmen's compensation insurance. This average cost per square foot per annum or the Government established rate, whichever is higher, will act as the base rate for these services for the first five (5) year period. The Lessor and the Government will then negotiate a base rate for these services for the second five (5) year term based on projections of estimated costs of wage rates, materials, etc. The difference between the base rate for the first five (5) year period (actual cost or the Government established rate, whichever is higher) and the base rate for the second five (5) year period (estimated cost for the same services) will determine the increase or decrease of rental for the second five (5) year period. This new base rate will be the base rate for the second five year term for purposes for

determining increase or decrease of rental for the third five (5) year term. The procedure described above will be used to determine the base rate for each subsequent five (5) year period.

The Lessor shall be required to notify the Government immediately should renegotiations of contracts or services be instituted and shall submit proposals to the Government for review prior to taking any action which would result in requests for rental adjustments. Rental adjustments shall be allowed for the above operating costs based on supporting data submitted by the Lessor to the Government's contracting officer at least 90 days prior to 5th, 10th, 20th and 25th anniversary dates of the lease. In the event an agreement has not been reached between the Lessor and the Government as to the amount of escalation, and the new rental rates, by the above anniversary dates the Lessor shall continue to provide services until such time as the Government can make arrangements to provide the services, however, in no event shall this period exceed 90 days. In any event, the new rates shall be effective at the beginning of the new escalation period. The following information shall be submitted whether or not the information shall lead to an increase or decrease in the base rate:

(1) The prevailing wage rates upon which the existing base was established;

(2) The current costs for materials;

(3) A reasonable figure for overhead and profit to be realized by the cleaning contractor.

Any upward or downward adjustment will be limited to the Government's estimated cost of providing such service during the ensuing five year period. New rates, if any, for succeeding periods as established by agreement between the parties shall automatically result in increases or decreases to the above base rates.

If, in the opinion of the Government's contracting officer,

the requested adjustment is unreasonable, the Government shall have the right to participate in subsequent negotiations between the Lessor and his contractor or employees, and, if still unacceptable shall have the right to perform these services and to deduct from the annual rental an amount based upon the actual average cost to the Lessor during the immediately preceding period; however, the deduction shall in no event be less than the immediately preceding period's base rate.

NOTE: With respect to Paragraph 11 of the General Provisions and Instructions, Standard Form 2-A, February 1965 edition, the Contractor agrees that all the rights granted thereunder to the Comptroller General of the United States or his duly authorized representative shall also extend to the Administrator of General Services or his duly authorized representative.

8. Your attention is invited to the enactment of Public Law 89-601. The Department of Labor is responsible for the issuance of rules and interpretations.

Attention is specifically invited to the provisions of Section 305 of Public Law 89-601 which provides for special coverage with respect to certain employees of contractors providing services to the Federal Government. In addition, the Department of Labor has ruled informally that contractors holding existing service contracts subject to the Service Contract Act of 1965, whereby payment of the minimum wage is made applicable to employees engaged in the performance of the contract, are required to increase such payments in accordance with Public Law 89-601.

It should be particularly noted that with respect to any contract for the furnishing of services to the Federal Government, the provisions requiring specified hourly rates of pay contained in the Fair Labor Standards Act of 1938 and the Service Contract Act of 1965 are in most

instances variously applicable to all employees of the contractor and any subcontractors under such contract. Generally, such employees must be paid the minimum wages provided for by Sections 6(a) (1) or (b) of the Fair Labor Standards Act of 1938, except those whose wages are governed by the Service Contract Act of 1965 (i.e., those who are engaged in the performance of the contract.)

9. In the event it becomes necessary to provide guard services for all or a part of the premises leased to the Government, the lessor will submit or see to it that his contractor submits within 10 calendar days from the date of a written request to do so a completed "Fingerprint Chart," Form FD-258, and "Statement of Personal History," GSA Form 176, the necessary investigation forms for each of the employees who will provide building operating services in the leased space. Additional forms will be submitted for any new employees added to the work-force during the term of the lease. The lessor and/or his contractor will not retain on the work-force cleaning and maintaining the leased space those persons who have been determined by the contracting officer to be unreliable and untrustworthy on the basis of arrests for criminal offenses and other information available to the contracting officer of the Government."

10. The following factors are in addition to award factors mentioned under Paragraph 13, Page 11 of Schedule D:

Consideration will be given to the need for development and redevelopment of areas and the development of new communities, and the impact selection of the offer will have on improving social and economic conditions in the area.

Consideration will be given to the availability of adequate low and moderate income housing, adequate access from other areas of the urban center, and adequacy of parking to offered location.

Consideration will be given to the consistency of the proposed development at the location offered with State, regional and local plans and programs.

11. *Special Requirements*

A. *Communications Room*

In a room of approximately 400 net usable sq. ft. the following Government-owned equipment shall be installed by the Lessor as part of the rental consideration:

1. One automatic Send/Receive (ASR) 35 (Keyboard/Printer)

2. One Data Communication Terminal (DCT) 2000.

Floor loads in this room must be designed to support the equipment: the DCT 2000 (see #2 above) weighs 1000 lbs. and the ASR 35 (see #1 above) weighs 225 lbs.

Environmental Requirements

Recommended Temperature Limits—temperature 70 degrees F. to 75 degrees F. and relative humidity 40% to 60%.

Maximum and minimum limits—temperature 60 degrees F. to 80 degrees F. and relative humidity 30% to 70%. Temperature changes should be held to 20° F/hour dry bulb linear change to prevent condensation on or in the DCT 2000.

A dedicated air conditioning unit should be provided where possible. If the regular air conditioning system is utilized, special ducting and humidity control is required to provide environmental restraints stated above.

Heat dissipation requirements for all equipment and personnel will be approximately 10,000 BTU/hour, and air circulation 325 CFM.

Sensitivity—thermostat ± 2 degrees F. and humistat ± 5%.

Mechanical Filters (when required) — minimum efficiency rating of 20% (National Bureau of Standards discoloration test using atmospheric dust).

Electrical Power

ASR 35—115 Volt AC ± 10%, 60 HZ ± .75 HZ

DCT 2000—208/240 Volt AC ± 10%, 60 HZ ± 0.5 HZ

Total KVA 4.0

Equipment lines should be dedicated.

Master emergency "cut-off" switch to be provided.

B. *Cafeteria and Kitchen Area*—12,000 net usable sq. ft.

The Lessor, as part of the rental consideration, shall furnish, install and maintain all equipment for food preparation, food services and facilities required to operate the cafeteria. The Government shall have the right to sublease the cafeteria to a concessionaire of its own choice who will be required to furnish all small wares such as knives, forks, spoons, plates, etc. Utilities for the cafeteria, including water, sewer, electric current, gas and heating fuel shall be separately metered (Lessor to install meters) to enable separate payment by the concessionaire to the Lessor for the concessionaire's use of electric current for lights and power, water and gas. The successful offeror will furnish and install, as part of the rental consideration, complete cafeteria service for the exclusive use of the Government. The cafeteria will be approximately 12,000 net usable sq. ft. including a kitchen area of approximately 5,200 usable sq. ft.

The following indicates the general type of equipment to be furnished by the Lessor:

Ice storage bins, broilers, cabinets, can-washing equipment, counters (display, sandwich racks, steam tables), urns, fountains, dishwashing equipment, ovens, mixers, ranges, refrigerators, freezers, sinks, steam tables, toasters and hot plates.

In addition Exhibit I attached hereto indicates the specific equipment to be furnished.

In the dining area, sufficient tables and chairs will be provided by the Lessor. Silverware, dishes, napkins, cash registers, food trays and all other equipment not listed above or in Exhibit I will be furnished by the Lessor and will be the responsibility of the cafeteria concessionaire.

The Government will enter into a separate contract for the cafeteria concession.

Cafeteria and kitchen area ceiling to be washable acoustical tile in a concealed or exposed grid system and composed of perlite or mineral fibers clad with a sheet of perforated aluminum or vinyl coated mineral fiber tile, color white—10′ ceiling height.

The kitchen shall have quarry tile or terrazzo floors, and walls of glazed tile with integral cove at floor. The cafeteria floor shall be terrazzo with terrazzo cove base; the walls shall be vinyl spray over plaster. The kitchen area will not be air conditioned.

The cafeteria area will be cleaned by the concessionaire.

ADDENDUM TO SCHEDULE A
SOLICITATION FOR OFFERS NEG(70)-63
PHILADELPHIA, PA.

The following Paragraph 11.C. is added to Schedule A:

11.C. The cafeteria and kitchen equipment referred to in Paragraph 11.B. and Exhibit I shall be of sufficient capacity to provide four (4) feeding periods of approximately ½ hour each between the approximate hours of 12 Noon and 2 PM daily. Sufficient tables and chairs to accommodate 500 employees at a single setting are required. The cafeteria shall be serviced by a freight elevator of sufficient capacity.

September 30, 1970

EXHIBIT I

CAFETERIA EQUIPMENT

Item		Quantity
1.	Ranges	3
2.	Fryers	2
3.	Spreader Plates	2
4.	Kettles	2
5.	Steamers	2
6.	Hoods with Soffit	2
7.	Mixer	1
8.	Cook's Table w/Bain Marie & Sink	1
9.	Roasting Ovens	2
10.	Hood over Ovens	1
11.	Service Counter	1
12.	Pass Window Buck	1
13.	Pass Thru Warmer	1
14.	Cook's Table with Sink	1
15.	Overhead Pot Rack	1
16.	Work Counter	1
17.	Wall Mounted Utensil Rack	1
18.	Slicer	1
19.	Wall Cabinet	1
20.	Spare No.	
21.	Spare No.	
22.	Spare No.	
23.	Mobile Pot Rack	1
24.	Pot Sink	1
25.	Pot Scrapping Table w Gooseneck	1
26.	Spare No.	
27.	Spare No.	
28.	Pass Thru Refrigerator	1
29.	Utility Carts	2
30.	Prep. Table	
31.	Sink	1

EXHIBIT I *(Cont.)*

Item		Quantity
98.	Mobile Ice Cream Cabinets	2
99.	Toasters	2
100.	Toaster Stands	2
101.	Mobile Pastry Racks	4
102.	Condiment Stands with silver & napkin dispensers	4
103.	Cashier's Stands with Tray Slides	4
104.	Traffic Rails	2
105.	Water Stations w/Shelves & Tray Slides	4
106.	Spare No.	
107.	Mobile Self Leveling Tray Dispensers	6
108.	Silver & Napkin Stands	6
109.	Bussing Carts	16
110.	Metal Shelving	
111.	Refrigerator Shelving	
112.	Spare No.	
113.	Spare No.	
114.	Spare No.	
115.	Spare No.	
116.	Walk-in refrigerator—freezer type	1
117.	Walk-in refrigerator—chill type	2
118.	Garbage refrigerator—chill type	1
119.	Can washer	1

SCHEDULE B

GENERAL BUILDING REQUIREMENTS AND SPECIFICATIONS

PART I

GENERAL

1. *Introductory.*

a. Schedule D of this Solicitation should be carefully reviewed to determine whether a MODIFICATION, CHANGE OR ADDITIONAL SPECIFICATION provision has been inserted and is applicable to this Schedule B.

b. Unless specified to the contrary, whenever such words as "provide," "furnish," "submit," "required," appear in this Schedule without specific reference to any party, it shall be understood that the successful offeror/lessor, rather than the Government, is responsible for meeting the requirement or specification. Whenever the words "approval," "prior approval," "judgment," are included without reference to any party, it shall be understood that the contracting officer, rather than the successful offeror/lessor, is responsible for the action.

c. The requirements and specifications established in this Schedule represent minimums which must be met or exceeded. They are not all inclusive, but provide a guideline for offerors as to quality and standards required by the Government. Any building design or construction feature not covered by this Schedule shall be subject to final approval by the contracting officer. As a general rule, the contracting officer's standards will be consistent with local or nationally recognized building practices.

d. All work must be done by mechanics or workmen skilled in their respective trades and must be done in a workmanlike manner, present a good finished appearance, and be acceptable to the contracting officer.

e. Unless specified to the contrary in Schedule A or by the contracting officer prior to award, all materials used shall be those which are generally recognized as acceptable for the type of structure involved.

f. The building or space, and related equipment, and any utilities or services furnished and activities of other occupants (if any) shall be free of accident and fire hazards which in any way affect Government operations, property or personnel. When such hazards are detected they must be promptly corrected at no direct expense to Government. Unless specifically exempted elsewhere in this specification or by written statement of the contracting officer any building being considered in whole or in part for lease shall, as a minimum meet the local building and fire code requirements applicable to new privately owned buildings with a classification equivalent to that type of space specified in Schedule A of this solicitation. Where requirements conflict, the decision of the contracting officer shall be final.

2. *Site.*

All offers must clearly identify the location of the property. Proposals which do not identify the property may not be considered.

3. *Plans and Specifications.*

a. Required attachment to all offers:

(1) Two copies of a schematic floor plan(s) drawn to a scale of ⅛ or ¼ inch to the foot indicating the space offered and showing the location of all existing windows, entrances and exits from the building, type of construction, interior finishes of walls and ceilings in all habitable rooms, corridors, and exitways, structural features, and mechanical equipment Alterations or other work planned for the purpose of meeting solicitation specifications must be clearly shown on the plans and/or explained in an attached narrative statement.

(2) Where new construction is proposed, one copy of a plot plan drawn to scale showing all existing or proposed improvements and landscaping.

(3) One copy of a list of all other tenants in the building including the type of business undertaken by each.

b. Additional data which may be required prior to award:

(1) If specifically requested in writing by the Government, two copies of outline plans and specifications containing more detailed information about external and internal architectural and mechanical electrical features must be furnished within ten days of the request.

NOTE: Failure to provide the plans and/or specifications in accordance with a and b, above, may cause the offer to be deemed nonresponsive and rejected accordingly. Photostatic copies are not acceptable.

c. Required to be submitted subsequent to award:

(1) Unless otherwise stated in the offer, the arrangement of partitions and relating building equipment to be installed after award shall be considered tentative, and the offeror agrees to locate such partitions and equipment as directed by the contracting officer, provided, however, that the offeror shall not be required to install partitioning for a greater number of individual rooms and/or linear feet than specified in Schedule A. In this connection, reproducible drawings (not sepia) must be furnished by the successful offeror to a scale of ⅛ inch to the foot for each floor of the space offered, within five working days after award. Drawings shall show a minimum of construction information other than permanent walls, windows, columns, column numbering, module spacing, (if building is so designed) permanent partitions, peripheral floor-mounted obstructions, and convector or convector housings.

(2) When the space is completed and ready for use, the successful offeror shall furnish reproducible drawings of floor

plans to a scale of 1/8-inch to the foot showing the space as it is then partitioned for use by the Government, and showing architectural, structural, plumbing, heating and ventilation, electrical and air conditioning details.

4. *Door Identification.*

Metal title card holders, approximately 6½" high by 8½" wide, with cards, shall be installed in an approved location to all office entrances, toilets, stairways, etc. for interior door identification purposes. Other forms of door identification may be provided if approved by the contracting officer.

5. *Building Directory.*

A wall-mounted glass-enclosed directory, with lock, shall be provided at a conspicuous location in the lobby or entrance of the building. The directory shall be sufficient in size to list all Government agencies in the building, and shall be constructed substantially in accordance with specifications which are available from the GSA regional office issuing this solicitation.

6. *Bulletin Boards.*

This item is required only if so specified in Schedule D. Each bulletin board shall be approximately 3 feet wide and 6 feet long, consisting of ½-inch, 3-ply plywood to which five-grained compressed cork board, ¼-inch thick, shall be attached with water resisting adhesive. Wall location of the panels shall be as directed by the Government.

7. *Display Advertising.*

When the premises are for the exclusive use of the Government, the air space about the premises shall not be used in any manner except as necessary for the operation and maintenance of the premises. No signboards or advertising matter of any nature shall be constructed on or over the premises, without the written consent of the contracting officer.

8. *Alterations and Installations.*

The Government reserves the right to make minor alterations or installations, including but not limited to painting, installation of electrical outlets, erection or relocation of movable partitions.

9. *Flag Pole.*

If the Government is the sole occupant of the building, a metal, gold-ball flagpole with a safe means of access for raising and lowering the flag shall be provided at the front of the building, to the left of the main entrance as you face the building, complete with halyards, sheaves, and cleat. The pole should extend a minimum of 30 feet above the ground and be so arranged that the flag can be raised and lowered from the ground. If, in the judgment of the contracting officer, installation at the ground level is not feasible, a comparable quality building mounted flagpole may be substituted. The flag will be furnished by the Government.

SCHEDULE B

GENERAL BUILDING REQUIREMENTS AND SPECIFICATIONS

PART II

ARCHITECTURAL

1. *Type of Building.*

a. The building shall be sound and substantial and of a type generally recognized as a modern office type building used for purposes similar to those set forth in this solicitation. Unless specifically exempted elsewhere in this specification, the building shall be of non-combustible construction if one story in height and of fire-resistive construction if more than one story in height. The minimum requirements for non-combustible and fire-resistive construction shall be as defined in National Fire Protection Association Standard No. 220, Standard Types of Building Construction. Buildings which, in the determination of the contracting officer, have incurable functional obsolescence which will adversely affect the Government's operations, will be rejected. In new construction, all exposed concrete columns shall be finished smoothly, with all pits, indentations and rough surfaces removed.

b. The design of the space offered and the physical characteristics of the building and the surrounding area are subject to the requirements of par. 13 of Schedule D—Award Factors.

2. *Entrances and Exits.*

Exterior doors shall be of a weathertight construction, equipped with automatic door closers and shall open out of the building. All exists and access to exits that may be used by the Government or those entering the building to do business with the Government shall comply with the requirements

of National Fire Protection Association Standard Number 101, Code for Safety to Life from Fire in Buildings and Structures. Vestibules shall be provided at public entrances and exits wherever weather conditions and heat loss are important factors for consideration. In the event of negative pressure conditions, provisions shall be made for equalizing air pressure.

3. *Corridors and Stairways.*

Consistent with the type of building, all corridors, doorways, hallways, stairways, and any other area used for thoroughfares shall have widths meeting or exceeding the requirements of the Code for Safety to Life From Fire in Building Structures, National Fire Protection Association Standard No. 101. All stairs shall have appropriate and adequate handrails. Also, the stairs shall have safety treads, either built-in, or of the abrasive cement-on type. Fire escapes shall not be considered as constituting acceptable exits unless specifically approved by the contracting officer and then only if all access from Government occupied space is through doors and all openings exposing the fire escape are protected by fire doors or wire glass in steel frame fire windows.

4. *Floors.*

a. *Floor Covering.* Underfloor cement shall be smooth and level. Floors in all offices, corridor areas, etc. (but not necessarily in storage areas) shall be covered with vinyl asbestos. Where floor covering is to be newly installed or where existing covering must be changed to meet the requirement, color must be approved in advance by the Government. Terrazzo or unglazed ceramic tile and or quarry tile, or other covering acceptable to the Government shall be used in all toilets and service areas. Perimeters shall have a 4″ rubber or vinyl tile straight base. The type and grade of covering shall be stated in the offer.

b. *Floor Load Capacity.* All office areas shall have a minimum live load capacity of 70 pounds per square foot, and

storage areas shall have a minimum live load capacity of 100 pounds per square foot, unless otherwise specified. A written certification of the floor load capacity by a Registered Professional Engineer may be required and, if so, must be furnished at no cost to the Government. The calculations and structural drawings substantiating the Engineer's findings shall also be furnished if required by the Government.

5. *Ceilings.*

a. *Height.* The space shall have basically flat ceilings with a height of approximately 8'6", but not higher than 11 feet nor less than 8'0" clearance from the floor to the lowest obstruction, including lighting fixtures. The ceiling height shall be stated in the offer.

b. *Acoustical Treatment.* All ceilings shall have acoustical treatment with the exception of the service areas, i.e., toilets, janitors' closets, storage areas, vaults, stairwells, and mechanical areas. Acoustical material shall have a noise reduction coefficient range of 0.65 to 0.80. The noise reduction coefficient should be stated in the offer and a noise reduction certification by a Registered Professional Engineer of the manufacturer must be furnished at no cost to the Government if required by the contracting officer.

c. *Flame Spread.* All ceilings, including any acoustical treatment, shall consist of noncombustible materials having a flame spread of 25 or less and a smoke development of 50 or less, when tested in accordance with the American Society for Testing Materials Standard E-84, current edition. A surface treatment to reduce the flame spread rating to 25 or less and the smoke development to 50 or less (initially applied by the lessor and to be maintained by him throughout the term of occupancy by the Government) will be considered acceptable provided:

(1) The treated material is installed directly to a noncombustible material so that there are no airspaces behind the combustible material.

(2) The surface treatment used is approved or listed as a fire-retardant surface coating by Underwriters' Laboratories, Inc., or another recognized laboratory acceptable to the contracting officer, to produce fire-hazard ratings not exceeding the level required for the finish involved and the application is made in strict compliance with the manufacturer's and the testing laboratory's instructions and meets the requirements of Federal Specification TT-P-0026b.

(3) The treatment is reapplied as frequently as necessary to maintain its effectiveness.

6. *Partitions and Walls.*

The space or room partitioning requirements established in Schedule A may be met with existing partitions and walls, provided that, in the opinion of the contracting officer, the location and type of partitions lend themselves to efficient office layout. Combustible partition finishing materials such as plywood, fiberboard, and hardboard shall not be used except that decor finish plywood having flame spread ratings of not more than 25 in corridors or exits or 75 in individual rooms shall be acceptable. Offeror must state whether his offer is based on existing partitions. In the event existing partitions are unacceptable to the contracting officer, partitions must be furnished in accordance with the requirements of Schedule A and in accordance with the standards below.

a. *Permanent Partitions.* All partitions surrounding areas such as stairs, corridors, elevator shafts, toilet rooms, restrooms, and janitors' closets shall be of sturdy, soundproof and fireproof permanent construction, from structural floor slab to structural ceiling slab.

b. *Office Subdividing Partitions.* All partitions shall be constructed or erected on finished floors, and shall be furnished complete with all necessary hardware. All metal types shall have baked-on finish of color or colors selected by the Government. The wallboard of demountable types shall be painted with colors selected by the Government.

(1) *Wallboard and Metal Stud.* These partitions are to be installed on the finished floor and must be of metal stud and plaster or gypsum wallboard. Wallboard must be either pre-finished construction or taped and painted in a workmanlike manner.

(2) *Metal Movable Partitions.* These partitions are manufactured in ceiling-height and approximately 7'3" height (¾ height). They shall be flush type not less than 2¼" nor more than 3" thick and shall consist of movable hollow metal insulated panels and opaque or clear glass upper panels with double insulated end fillers. (Omit glass if none specified.) Base shall be removable and provide for lay-in concealed wiring on both sides. Partitions shall be factory fabricated, designed for erection over finished floors, and shall be in standard units. Panel units shall be interchangeable with glazed or door units. Where panel and glazed or door units are of different widths, the increments shall be maintained. Design shall permit extension two, three, or four ways, without removing adjacent units. Provision shall be made for electrical wiring throughout the assembly. Base and ceiling members shall be designed to permit 2½" adjustment in overall height; wall channels shall be designed to permit scribing to irregularities in the wall.

Assembly shall permit removal of any panel unit without disturbing adjacent panels. Cut-outs and reinforcing in panel units and posts shall be provided for electrical switches and in base for outlets in locations to be designated after award.

Where ceiling height partitions are required, the top filler shall be double sheet mineral board, ⅜" thick applied over studs set 24" on centers, or (optional) No. 20 gauge double steel with single line joints. All top filler to be neatly scribed to fit around pipes, ducts, beams, etc., and to ceiling. Double mineral board top filler to be painted in field to match ceiling. Double steel top filler to be factory finished to match partition.

Where ceiling height partitions are required, the partitions shall be packed with a sound-deadening material to provide an average sound transmission loss of solid partition unit and door of not less than 35 decibels over a range of 125 to 4,000 cycles per second, in accordance with ASTM E 90, as certified by an approved testing laboratory. Where top and end fillers occur, these fillers shall be packed with similar acoustic material meeting the requirements stated above.

(3) *Demountable Panel Partitions.* Construction is similar to the metal movable partition except that the panel surfacing material shall be either gypsum, asbestos, or other materials as specified in Schedule A.

(4) *Bank-Type Partitions.* Partitions shall be flush type with lower panel 1⅝" thick with a plus tolerance of ⅛" and a minus tolerance of 3/16", and approximately 5'7" high and shall consist of movable and interchangeable hollow metal insulated panels and post construction with upper plate glass panels. Posts shall be 1¾" square. The panels shall be uniform widths. The bottom of each panel shall be approximately 6" clear of the floor and have recessed space for electric wiring for exterior attachment, including spring clip holder for the wire.

7. *Windows.*

All movable sash shall be weathertight and designed to permit easy cleaning. Casement sash shall open out. Wherever windows extend to within 18 inches from the floor (and the space is located at least 10 feet above grade) a suitable metal bar shall be provided on the interior window opening approximately 3 feet above floor level.

8. *Window Covering.*

All exterior windows shall be equipped with venetian blinds or drapes of acceptable quality. Blinds shall have baked enamel, steel or aluminum slats at least two inches wide and

SCHEDULE B

GENERAL BUILDING REQUIREMENTS AND SPECIFICATIONS

PART III

MECHANICAL—ELECTRICAL

1. *General.*

The successful offeror shall be responsible for insuring that all plumbing, heating, air conditioning, ventilating, elevators, and other necessary electrical and mechanical features conform to the requirements of this part and are installed and operated in accordance with the latest editions of all local codes, ordinances, and regulations, plus the latest edition of the various publications set forth below. The offeror shall also be responsible for the installation of mains, lines, and meters necessary for all utility services. All such equipment shall be checked and adjusted by the successful offeror prior to and during occupancy by the Government. All ducts, piping and conduits shall be concealed within the walls or covered by furring, plastering, acoustical treatment, or other comparable means, except in service and storage areas, or areas not normally used by office employees or the public.

2. *Plumbing Facilities.*

In addition to the following, all plumbing shall meet the requirements of the National Plumbing Code.

a. *Drinking Fountains.* Centrally cooled, filtered, water system, drinking fountains, or the automatic electric type fountains shall be located adjacent to the toilets and at other strategic locations, so that a person will not need to travel more than a hundred and fifty feet (150 feet) on one floor to reach same. The water shall be chilled to between 48 and 52 degrees Fahrenheit. There shall be a minimum of one fountain

on each floor containing office space. Recessed or wall-hung fountains are preferred.

b. *Toilets.* Separate toilet facilities for men and women shall be provided on each floor in the building. The facilities must be located so that employees will not be required to travel more than 150 feet on one floor to reach the toilets. Each toilet room shall have sufficient water closets enclosed with modern stall partitions and doors, urinals (in men's room) and lavatories in compliance with the fixture schedule set forth below. In addition, each main toilet room shall contain the following:

(1) A liquid soap dispenser, shelf and mirror above lavatory.

(2) A modern toilet paper dispenser in each water closet stall.

(3) A coat hook on inside face of door to each water closet stall and on several wall locations near the lavatories.

(4) At least one modern paper towel dispenser and waste receptacle for every two lavatories.

(5) A coin operated sanitary napkin dispenser in women's toilet rooms with waste receptacle for each water closet stall.

(6) Ceramic tile wainscot from the floor to a minimum height of 4'6".

(7) Women's toilet rooms shall be large enough to accommodate a couch approximately 75" long and 30" wide together with accompanying chair.

(8) A convenience outlet located adjacent to one mirror in each men's room.

TOILET FIXTURES

For the purpose of determining the required toilet facilities, the actual number of persons shall be based on one person

for each 150 square feet of net usable office space in ratio of 55% men and 45% women. The toilet fixture schedule specified shall be applied on a per floor basis.

Number of Persons	MEN			WOMEN	
	Water Closets	Urinals	Lavatories	Water Closets	Lavatories
1 to 8	1	1	1	1	1
9 to 24	2	1	1	2	2
25 to 36	2	1	2	3	2
37 to 56	3	2	2	4	3
57 to 75	4	2	2	5	4
76 to 96	4	2	3	6	4
97 to 119	5	2	3	7	5
120 to 144	6	3	4	8	5
145 to 171	6	3	4	9	6
172 to 200	7	3	4	10	7
201 to 220	8	4	5	11	7
221 to 240	8	4	5	12	8
241 to 260	9	4	5	13	9
261 to 280	10	4	6	14	9
281 to 300	11	4	6	15	10

3. *Janitor Closets.*

Janitor closets, containing a service sink with hot and cold water supply and ample storage space for cleaning equipment, materials, and supplies, shall be provided on all floors.

4. *Heating, Airconditioning and Mechanical Ventilation.*

Heating, airconditioning, and ventilation systems are required which are capable of maintaining the temperature at 76 degrees F., plus or minus 2 degrees F. and maximum relative humidity of 50% the year around throughout the entire leased premises and service areas, regardless of outside temperatures.

Areas having excessive heat gain, or heat loss, or affected by solar radiation at different times of the day, shall be

independently controlled so that the interior temperature conditions stipulated can be maintained. Temperatures in all spaces will be maintained without drafts and airconditioning equipment noises.

Exhaust ventilation shall be provided as required for conference room(s) and special equipment such as teletype machines. The airconditioning system shall be designed and installed to meet Common Use and Recommended Standards as established by the current American Society of Heating, Refrigerating and Airconditioning Engineers, Inc., Guide; National Fire Protection Association Standards No. 90A and 91; and American Society of Refrigeration Engineers Standard No. 15.

A mechanical ventilation system must be furnished which provides for exhaust of stale air, proper circulation of air without creating drafts and introduction of adequate tempered fresh air to insure a minimum of 25% fresh air at all times. In toilet rooms, however, exhaust air quantities for mechanically ventilated toilets shall be 50 c.f.m. for each water closet or urinal, or 2 c.f.m. per square foot of floor area, whichever is greater. Mechanical exhaust shall be provided for the following toilet rooms:

a. A toilet with an open window area less than 5% of its floor area.

b. A toilet having windows opening on a court or vent shaft which has an area less than:

(1) 9 square feet

(2) 0.2 square feet for each foot of height

(3) 2% of the combined floor area it ventilates, or 5% of its floor of any single room it ventilates.

c. Toilets in or adjoining airconditioned areas.

5. *Elevators.*

All elevators shall conform to the requirements of the current edition of the American Standard Safety Code for

Elevators, Dumbwaiters and Escalators (ASA-A-17); also the local codes and ordinances. The passenger elevators in the building must have the capacity to transport in five minutes fifteen percent of the nominal total population of all upper floors (based on 125 square feet per person of net usable space). Further, the dispatch interval between elevators during the *up-peak* demand period should not exceed 35 seconds.

Upon request by the Government the following information shall be furnished: location, capacity in pounds, inside cab areas, rated car speeds, and type of operation of the passenger elevators. In addition, information showing the five-minute handling capacity of the passenger elevator at each separate location shall also be submitted upon request to show either the calculated capacity or actual capacity by surveys during the following conditions: (a) heavy *up-peak* demand such as would occur during the arrival period; (b) heavy two-way demand as would occur during the noon period; and (c) heavy *down-peak* demand such as would occur during the departure period.

6. *Electrical Main Service Facilities.*

All work not specifically described shall be designed to meet the requirements of the latest edition of the National Electrical Code, the National Electric Safety Code, Standards of the National Electric Manufacturer's Association, Insulated Power Cable Engineers' Association, the American Institute of Electrical Engineers, and local codes and ordinances. The main service facilities and meter panel and branch circuits shall be adequate to provide for electrical load that will be required. This service shall be in a suitable enclosure which is readily accessible for inspection. The area within the enclosure around the electrical service shall not be used for storage or other purposes. Distribution panels are to be circuit breaker type as standard for the building and shall contain a minimum of 10% spare circuits over the circuits required by the Government.

7. *Electrical and Main Service Outlets.*

Duplex outlets, floor and wall (including clock outlets) shall be provided on the basis of one outlet per 50 net usable square feet of space for the operation of office machines and equipment. Telephone outlets shall also be provided on the basis of one for each 100 net usable square feet. In any event, each room shall have at least one duplex electrical outlet and each office-type room shall also have one telephone outlet. In larger open-type office areas, it is desired that the space shall be equipped with recessed floor conduit, on eight foot centers, large enough to accommodate the required power and telephone lines. Duplex utility outlets shall be provided in toilets and corridors for maintenance and also in dispensing areas. Outlets to be circuited separately from the lighting with not more than 8 such outlets on one circuit. The Government may elect to locate such outlets as it is entitled to under this paragraph at locations other than as herein specified, provided that the total number of outlets shall not exceed the amount it would otherwise receive if installed as provided above. 220 volt electric service must be available on all floors.

8. *Lighting.*

Modern, diffused, fluorescent electric fixtures shall be provided throughout all office areas to produce and maintain a minimum of 75 foot-candles; in drafting rooms and engineering rooms the minimum shall be 100 foot-candles; a minimum of 45 foot-candles in toilet, public reception and storage areas, and 25 foot-candles (incandescent or fluorescent) in closets, corridors and other public areas. These standards refer to maintained light at desk level. Continuous, recessed lighting fixtures are preferred, but flush-mounted fluorescent fixtures, attached to the finished ceiling are acceptable. All light fixtures shall be controlled by wall switches conveniently located on columns or walls adjacent to door openings, but in open office areas, not over six fixtures shall be controlled by one switch. In corridors and space with more than one entrance, three-way switches shall be provided.

Ballasts are to be rapid-start, thermally protected, voltage regulating type UL and ETL approved. All building entrances must be adequately lighted outside.

9. *Exit and Emergency Illumination.*

Exit and emergency illumination shall be provided in accordance with the National Fire Protection Association Standard Number 101, "Code for Safety to Life" in such a manner as to maintain exit illumination automatically in the event of any failure of normal lighting due to fault in the main lighting system, due to any failure of public utilities or other outside electric power supply, or any single manual act such as accidental opening of a switch controlling normal lighting facilities.

10. *Facilities for Physically Handicapped Persons.*

a. *Toilets.* In addition to the number and types of toilet fixtures and the location of toilet facilities specified in this schedule, not less than one men's toilet room and one women's toilet room shall have a water closet enclosure 3'-3" wide with assist bars and a door 2'-8" wide which swings outward. The entrance doors to these toilet rooms shall have a minimum width of 3'-0".

b. *Drinking Fountains.* In addition to the requirements for drinking fountains in this schedule, not less than one fountain shall be mounted with the bubbler not over 38" from the floor. This paragraph and a, above, shall be in accordance with U.S.A.S.I. Standard A-117.

SCHEDULE B

GENERAL BUILDING REQUIREMENTS AND SPECIFICATIONS

PART IV

SAFETY AND FIRE PREVENTION

1. *General.*

The building and related equipment, and any utilities or services furnished and activities of other occupants shall be free of accident and fire hazards which in any way will affect Government operations, property, or personnel. When such hazards are detected they must be promptly corrected at no direct expense to the Government.

2. *Portable Fire Extinguishers.*

Portable fire extinguishers of the 2½-gallon, stored-pressure or cartridge-operated (noninverted style only) water-type shall be provided by the successful offeror. As a minimum, one fire extinguisher shall be located in the isles and corridors near the points of egress to exits or stairways.

Both initial and replacement charges for all types of fire extinguishers shall be provided at no cost to the Government. The extinguishers shall be checked at least once a year by the lessor to assure that the fire extinguishers are in first-class operating condition.

3. *Standpipes.*

Standpipes for firefighting shall be provided if the building occupied by the Government is four or more stories in height. They shall be located preferably in stairwells with one riser for each stairwell, and shall be equipped with a 2½-inch valved outlet at each floor level. Adapters (2½-inch to 1½-inch) shall be provided at each outlet. Hose for the standpipes will not be required unless the local fire department requires the hose for fire department use.

4. *Manual Fire Alarm Systems.*

A manual fire alarm system shall be provided for buildings of over 50,000 rentable square feet in size, where the Government occupies space that does not have direct outside exits. Manual fire alarm stations shall be located on each floor in the normal path of exit from the building. The preferred location for the fire alarm stations is near the stairways.

Operation of the manual fire alarm station shall sound bells throughout the buildings or throughout the floor where the box is operated. The bells shall be placed so that every person can hear the bells when sounded. All alarms shall be automatically transmitted to the local fire department or to a central station. Installation and equipment shall conform to the requirements of the National Fire Protection Association Standard (70A, 70B, 70C, or 70D) appropriate to the type of system involved.

The equipment used shall be approved by the Underwriters' Laboratories, Inc., or by the Factory Mutual Laboratory.

SCHEDULE C

SERVICES, UTILITIES AND MAINTENANCE

The following service, utility, and maintenance requirements are in addition to and in conjunction with the building requirements of Schedule B. The lessor is required to have available a building superintendent on the premises during the tenant working hours stated below to promptly correct reported deficiencies.

1. *Services.*

The services listed below shall be provided daily, except Saturdays, Sundays, and Federal holidays during tenant work hours, from 8:00 a.m. to 6:00 p.m.

a. *Electrical Services.*

(1) *Lighting.* The lessor shall provide initial and replacement supplies of incandescent bulbs, flourescent tubes, starters, ballasts, switches and other related items, together with appropriate labor to provide and maintain satisfactory illumination in service throughout the life of the lease, as specified in Schedule B, Part III, par. 8.

(2) *Special Power.* Where airconditioning, computer systems, or other special facilities which require large quantities of power are elsewhere specified in the Schedules, the lessor shall be responsible for furnishing uninterrupted power service for such needs.

b. *Heating and Ventilation.*

(1) *Boilers.* If boilers are used to generate heat for the building, they shall be operated and serviced in accordance with ASME, Boiler and Pressure Vessel Code and local codes that apply.

(2) *Hot Air Furnaces.* Where hot air furnaces are used, they shall be operated in accordance with local and

national codes that apply and shall be periodically cleaned and serviced so as to provide an adequate flow of warm air to the office space. Where humidifying devices are used in conjunction with the furnace, they shall be periodically serviced to insure emission of the rated amount of moisture into the air stream prescribed for the equipment.

(3) *Heating Distribution System.* The heating distribution systems shall be operated to provide comfortable temperatures in the space leased. Hot water or steam distribution systems shall be periodically inspected and serviced to allow distribution of sufficient hot water or steam to the space occupied without undue delays or objectionable noises. Hot air heating distribution systems shall be adjusted and serviced to furnish heat without objectionable drafts, abnormal air velocities, disturbing noises or undesirable emission of dirt in the air. Filters shall be used in forced air systems and shall be cleaned, repalced, or otherwise appropriately serviced, as required, to properly fulfill their design intentions.

(4) *Ventilation.* In buildings where pedestal fans, wall-hung fans, roof-mounted exhaust fans, or other forced air mechanical ventilating equipment are provided to supplement natural ventilation, adequate service shall be provided to keep the equipment operating properly, presentable in appearance, and free from the objectionable features stated in the preceding paragraph dealing with heat distribution systems.

c. *Airconditioning.*

(1) *Airconditioning for Personnel.* The lessor shall schedule starting time of airconditioning equipment so adequate cooling in the space will be established prior to start of official Government working hours. The system shall be adjusted to operate without uncomfortable drafts, excessive air velocities, disturbing noise, or unusual emission of dirt. Air filters shall be provided and serviced, as required, to maintain adequate flow of clean cooled air to the office space.

(2) *Airconditioning Servicing.* The airconditioning equipment shall be periodically serviced to insure that compressors, electrical relay systems, refrigerant lines, cooling towers, filters and related appurtenances are operating at design capacity at all times when in operation.

d. *Plumbing and Sewage Disposal Service.* Plumbing and sewage service shall be provided and systems shall be operated and serviced in conformity to the national and local codes. Hot and cold running water shall be available in all toilet rooms. The temperature of hot water at the faucet outlets should be approximately 120 degrees Fahrenheit. Potable drinking water shall be furnished in standard fountains or refrigerated water coolers at a temperature of approximately 50 degrees Fahrenheit.

e. *Elevator Facilities.* The lessor shall provide suitable passenger and freight elevator service to leased space that is at least one floor above the street level. A current certificate indicating the elevator has been properly inspected for safe operating conditions shall be displayed in the elevator cab. The elevator may be operated manually or automatically and service shall be available from ½ hour before the earliest starting time to ½ hour after the latest closing time. Except in an emergency, the GSA representative shall be given at least 24 hours advance notice if elevator service is to be interrupted for more than 1½ hours. Interruptions for any purpose shall be scheduled to offer minimum inconvenience to the occupants of the leased space.

f. *Physical Protection and Normal Security.* The lessor shall provide security comparable to the type of protection given by commercial or business enterprises to prevent illegal entry into or loitering in the space leased; to prevent loss by pilferage or theft; and to admit to the space during off-duty hours only those who are authorized to enter.

g. *Overtime Services.*

(1) The Government shall have access to the leased

d. *Fire Equipment.* The lessor shall furnish labor, materials and supervision to service and maintain any internal fire equipment, sprinkler systems, standpipes, or fire escapes in a constant state of readiness. Hand fire extinguishers shall be serviced in accordance with applicable national and local codes or at least yearly and dated to show the last time they were inspected and/or recharged. The lessor shall cooperate with local fire authorities in the conduct of fire prevention or prefire planning inspections.

e. *Plumbing and Sewage Systems.* The lessor shall furnish labor, material, and supervision to maintain reliable, operable, and safe plumbing and sewer facilities in accordance with national and local codes. This includes hot and cold water lines, hot water heat or steam distribution lines, waste lines, drains, sewer lines, grease traps, vents, and any other related appurtenances.

f. *Interior Maintenance.*

(1) *Interior Maintenance of the Space Leased.* The lessor shall maintain the leased space in accordance with SF-2A par. 2

(2) *Painting.* The lessor shall repaint office space once every five years and public areas once every three years in accordance with Schedule B, par. 13. Painting shall be performed after tenant working hours.

4. *Cleaning and Janitorial Services.*

Attachment No. 1 to this Schedule outlines in detail the frequency and extent of cleaning and janitorial services required.

ATTACHMENT NO. 1 TO SCHEDULE C

Cleaning and Janitorial Services.

The Lessor shall maintain every part of the Leased Premises, including outside areas, in a clean and sanitary condition. The various phases of cleaning and janitorial work shall, as a minimum, be carried out at the frequencies indicated in the "Frequency Schedule" listed below The policing of corridors, lobbies and toilet rooms, servicing of toilet rooms with supplies, and and the washing of windows may be carried out at any hour, but interference with government personnel or government business shall be avoided. Other work shall be done after tenant working hours. The Lessor shall provide all necessary cleaning and janitorial supplies and equipment. A suitable jardiniere shall be provided at each elevator bank. Toilet supplies shall be of quality.

Frequency Schedule
Work To Be Accomplished

Frequency Not Less Than

1. *Daily.*

Outside Entrances: Sweep landings, steps, and adjacent sidewalks before starting time of government employees' work schedule.

Entrances, Lobbies, and Corridors: Sweep floors in lobby areas and corridors. Damp mop and buff resilient floors, Dust surfaces as appropriate. Spot-clean walls and interior glass. Clean drinking fountains. Scrub or wet mop hard floors.

Garage Space and Loading Platforms, Grounds, Sidewalks, and Approaches: Police loading dock areas, platforms, turn-around space, sidewalks, parking areas, lawns, and shrubbery, Sweep and clean guard booth, if applicable.

Escalators: Clean exposed surfaces of treads, risers, landings, and adjacent surfaces.

Ash Receptacles:

Dry Type: Empty container and bucket. Wash and dry.

Sand Type: Remove soiled sand and replace with fresh, clean sand. Clean exterior and opening.

Liquid Type: Empty, wash, and refill. Clean exterior and polish funnel.

Garbage and Garbage Cans: Remove garbage from premises. Wash garbage cans inside and outside and disinfect or steam clean. Remove and dispose of garbage and trash from snack bars, blind stands, and vending machines.

Stairways: Sweep or vacuum stair landings and steps.

Toilets: Sweep and scrub or mop floors. Wash and sanitize toilet fixtures, seats, and urinals. Clean wash basins. Damp wipe and polish dry: mirrors, shelves, dispensers, plated fixtures, and piping. Dust window sills, ledges, grilles, and stall partitions. Spot clean wall surfaces, partitions, doors, window frames, sills, and waste receptacles. Remove splashings around wash basins and urinals. Empty used paper towel receptacles. Empty sanitary napkin receptacles; clean, disinfect, and dry; provide new liner bag.

Room Cleaning: Includes office areas, file rooms, libraries, conference rooms, and adjacent corridor space. Empty ash trays and wipe clean. Empty waste baskets and dispose of waste. Sweep floors with treated sweep mop. Vacuum rugs. Dust all horizontal surfaces, including furniture, within approximately 70″ of floor. Clean glass desk tops with an untreated cloth. Spot clean wall surfaces, partitions, doors, window frames and sills. Clean wash basins, damp wipe and dry mirrors, replenish paper towels. Clean and service private toilets. Clean telephone booths and drinking fountains. (Replenish paper cups, if used).

Passenger Elevators: Clean interior surfaces of car and

crevices on corridor side of elevator. Vacuum rugs. Remove, wash, dry, and replace rubber mats.

2. *Weekly.*

Stairways: Mop or scrub steps, risers, and landings. Clean glass surfaces. Dust handrails, ledges, grilles, fire apparatus, doors, radiators. Polish bright metal and woodwork. Spot clean walls to a height of approximately 70".

Outside Entrances: Hose down (except in freezing weather) and remove the water on landings, steps, and adjacent sidewalks. Polish unpainted exterior and interior metal entrance doors and handrails. Clean both sides of glass.

Freight Elevators: Clean all interior surfaces of car, including hoistway door and crevices on corridor side of elevator.

Passenger Elevator: Clean, wax and polish resilient floors.

Toilets: Damp-wipe stall partitions, doors, window frames, and sills, and dust radiators.

Rooms: Damp mop and buff secondary corridors and clinical space with resilient floors. Scrub or wet mop hard floors. Dust all wall surfaces within approximately 70" of floor, vertical surfaces, kneewells, chair rungs, table and legs. Damp wipe glass in doors, partitions, pictures and book cases.

Garages and Loading Platforms: Sweep garages, garage ramps, related sidewalks, and loading platforms.

Grounds: Police for litter.

3. *Monthly.*

Rooms: Remove old wax, apply new wax and buff resilient floor space subject to heavy traffic, including main corridors, entrances, toilet rooms, clinical areas, and telephone

rooms). Monthly, in-between quarterly waxing, damp mop and buff waxed floors in office space, file rooms. Libraries, and conference rooms, to remove scuff marks. Wash mirrors in office space and both sides of bookcase glass. Wash clear glass in interior partitions, doors and transoms. Clean dead storage. Damp-wipe receptacles for used paper towels.

Garage and Loading Platforms: Wet mop or scrub garages, ramps, loading platforms and driveways.

Areaways and roofs: Police Balconies, ledges, courts, areaways, and flat roofs which are visible to occupants or visitors.

Toilets: Damp-wipe receptacles for used paper towels. Wash and wipe dry all wainscoting and stall partitions.

Entrances: Clean and polish metal door thresholds. Damp-wipe and polish dry marble wall surfaces limestone, and stone wainscot.

4. *Quarterly.*

Rooms: Damp-wipe wastebaskets inside and outside. Remove old wax, gum, soil, etc., from resilient (waxed) floors in office space, file rooms, libraries, conference rooms, and normal traffic areas, recoat with new wax, and buff. Use non-slip floor wax. Wash opaque glass in interior partitions and doors. Wash windows inside and outside. Wipe dry inside frames, casing, and sills. Dust outside frames and sills, including glass over exterior and vestibule doors. Perform high cleaning: Clean by dusting or vacuum all surfaces and objects 70″ or more above the floor. Include walls, acoustic ceiling, venetian blinds (in-between yearly washing), transoms, clocks, exposed pipes, ductwork, high files, ledges, mouldings, tops of partitions, ventilating and A.C. outlets, and return air grilles.

5. *Yearly.*

Venetian Blinds: Wash venetian blind slats. Clean or replace tapes and cords.

Lighting Fixtures: Wash lighting fixtures in office areas, libraries, file rooms, conference rooms, and in adjacent corridor space.

6. *As Required.*

Grounds: Cut grass during growing season and cultivate, weed and trim shrubs to maintain a good appearance.

Rooms: Take action necessary to exterminate rodents, vermin, insects, paper fleas, and rug moths, and to remove infestation if and when it occurs. Clean or shampoo rugs in offices.

Nuisances: Remove nuisance of birds and control recurrence.

Entrances: Remove snow and ice from sidewalks, approaches, steps, landings, etc., prior to occupants arrival, and/or while snow is falling or ice is forming on the walks. Use sand or chemicals to reduce slipping and other hazards due to snow or ice. Clean or shampoo rugs in lobbies, entrances, and elevators.

Toilets: Replenish paper towels, Toilet tissue, hand soap, and disposable seat covers. Maintain soap dispensers in an operable condition. Maintain toilet fixtures and traps free from odor.

SCHEDULE D
MISCELLANEOUS PROVISIONS

1. *The Government Reserves the Right to Reject Any or All Offers Received.*

2. *Fair Market Value and Fair Rental Value.*

Restrictions imposed by the Economy Act of 1932 (40 U.S.C. 278a) limit the amount of rental which may be paid and necessitate a determination of Fair Market Value of leased space involving a rental in excess of $2,000 per annum. Appraisals will be required in support of that determination and much of the basic material therefor must be furnished by the Lessor from building records. The offeror shall make available to the Government for appraisal purposes any pertinent information which is in his possession.

If the annual rental rate for the space offered, including the cost of services to be furnished by the Lessor, exceeds $2,000, the offeror must furnish on GSA Form 1217, Lessor's Annual Cost Statement, an estimate of the annual cost for the entire building of such services and utilities as are offered to the Government as part of the rental consideration (copies of GSA Form 1217 will be furnished when required).

3. *Rental Payment.*

All rental payments under the lease will be made by the Government on a calendar month basis in arrears beginning at the end of the first calendar month of the lease term, without submission of invoice or voucher.

Rental shall not be paid by the Government until the entire premises or suitable units thereof have been made ready for use and occupancy, and the Government reserves the right to determine when the space is ready for use and occupancy.

In the event of the Government's election of progressive occupancy by units, rent will accrue on a pro-rata basis for the space occupied and the commencement date of the firm term shall be determined by averaging the "square foot days"

of partial occupancy. Determination of the commencement date shall be made after full occupancy of the space has been completed.

4. *Delivery and Conditions of Premises.*

The space shall be delivered ready for occupancy as a complete unit. Being "ready for occupancy" includes but is not limited to being in a neat and clean condition, weathertight, moisture-proof, and with all mechanical facilities, equipment and fixtures in good operating condition. The Government reserves the right to determine when the space is ready for occupancy.

5. *Escalator Clauses.*

Offers or bids containing escalator clauses will not be considered unless requested by the Government.

6. *Zoning.*

Prior to award under this invitation, offerors may be required to furnish evidence that their property is zoned in conformance with the Government's intended use. Such evidence must be furnished within five (5) days from the date of the Governments' written request. Failure to provide satisfactory evidence will automatically make the bid nonresponsive. Moreover, if rezoning or a zoning variance is necessary for the proposed use of the property, the bidder must furnish evidence that such rezoning or variance would be authorized even if the Federal Government, as such, were not involved.

7. *Covenant Against Contingent Fees.*

The lessor warrants that no person or selling agency has been employed or retained to solicit or secure the leases upon an agreement or understanding for a commission, percentage,

brokerage, or contingent fee, excepting bona fide employees of bona fide established commercial or selling agencies maintained by the lessor for the purpose of securing business. For breach or violation of this warranty, the Government shall have the right to annul the lease without liability or, in its discretion, to deduct from the rental consideration, or otherwise recover, the full amount of such commission, percentage, brokerage or contingent fee. The Offeror's Representation (Item 11. GSA Form 1364, Proposal to Lease Space) required by FPR 1-1.5 (41 CFR 1-1.500 to 1-1.509) need not be completed in advertised leases in which the aggregate amount of rental involved does not exceed $25,000 or in negotiated leases in which the aggregate amount of rental involved does not exceed $2,500. The aggregate amount is the total value of the leasehold for the term thereof, not including value which may arise from vested renewal options, but regardless of cancellation privileges.

When the aggregate amount of rental in advertised leases does exceed $25,000, or in negotiated leases exceed $2,500, and if the bid or offer was submitted through a licensed real estate agent or broker or any other representative, the representation must be answered in the affirmative and the successful bidder or offeror will be required to complete Standard Form 119. The Government will then determine whether the licensed real estate broker or agent or other representative may be considered as a bona fide employee or commercial agent within the exceptions contained in the covenant.

The employment of licensed real estate agents or brokers in a customary business practice and the proper utilization of their services, although requiring an affirmative reply to the representation, will not adversely affect the right and privileges of the bidder, offeror, or agent.

8. *Disputes.*

a. Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract

which is not disposed of by agreement shall be decided by the contracting officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the lessor. The decision of the contracting officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the lessor mails or otherwise furnishes to the contracting officer a written appeal addressed to the head of the agency involved. The decision of the head of the agency or his duly authorized representative for the determination of such appeals shall be final and conclusive. This provision shall not be pleaded in any suit involving a question of fact arising under this contract as limiting judicial review of any such decision to cases where fraud by such official or his representative or board is alleged. Provided, however, that any such decision shall be final and conclusive, unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence. In connection with any appeal proceeding under this clause, the contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending final decision of a dispute hereunder, the contractor shall proceed diligently with the performance of the contract and in accordance with the contracting officer's decision.

b. This disputes clause does not preclude consideration of questions of law in connection with decisions provided for in a, above. Nothing in this contract, however, shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

9. *Parking for Employee Vehicles.*

a. Offerors shall make available for Government employees a pro rata number of parking spaces prescribed for the building by zoning regulations in effect as of the date of this solicitation, based on the percentage of the total amount of space in the building occupied by the Government. If applicable zoning regulations do not require onsite parking or park-

ing within a specified distance from the building, this is to be indicated in paragraph 8 of the proposal to lease space.

b. In event offerors have parking available for employee use, even though not required by zoning regulations, offerors shall indicate in paragraph 8 of the proposal to lease space the following additional information:

(1) Whether the parking spaces will be provided free of charge or what the maximum monthly charge per space will be during the lease term, and the number of parking spaces that will be made available. (In event parking spaces are to be furnished on a fee basis, the Government will not collect from employees nor be responsible for the payment of any parking charges.)

(2) If the offeror will charge employees for use of the parking spaces, he should indicate whether he will lease the spaces as a unit to an employees' association, and if so, how much he will charge the association per month.

(3) The monthly charge per space, or the charge for the spaces as a unit, which shall prevail during the lease term in event the lessor agrees under the terms of the Government lease to provide parking spaces for employee use on a fee basis.

10. *Termination for Default—Liquidated Damages—Time Extensions.*

a. If the lessor fails to prosecute the work required to deliver the leased premises ready for occupancy by the Government with such diligence as will insure delivery of the leased premises within the time required by the lease agreement, or any extension of the specified time, or if the lessor fails to complete said work within such time, the Government may, by written notice to the lessor, terminate the lease agreement. Regardless of whether the lease is terminated, the lessor and his sureties shall be liable for any damage to the Government resulting from his failure to deliver the premises ready for occupancy within the specified time.

b. In case of failure on the part of the lessor to complete the work within the time fixed in the lease contract or letter of award, the lessor shall pay to the Government as fixed, agreed, and liquidated damages, pursuant to this provision, the sum of $1,080,00 for each and every day that the delivery is delayed beyond the date specified for delivery of all the space ready for occupancy by the Government.

For liquidated damage purposes, the Government assures all offerors that it will provide the successful offeror with space layouts. The Government's failure to meet this obligation will constitute an act of the Government in its contractual capacity within the meaning of c(1), below. As a general rule, the assessed amount of liquidated damage, if any, will be withheld from rental payments which would otherwise be due.

c. The lease agreement shall not be terminated nor the lessor charged with resulting damage if:

(1) The delay in the completion of the work and delivery of the premises ready for occupancy by the Government, arise from unforeseeable causes beyond the control and without the fault or negligence of the lessor and/or his construction contractor, including but not restricted to acts of God, acts of the public enemy, acts of the Government in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, or delays of subcontractors or suppliers arising from unforeseeable causes beyond the control and without the fault or negligence of both the lessor and/or his construction contractor and such subcontractors or suppliers; and (2) the lessor, within 10 calendar days from the beginning of any such delay (unless the Government's contracting officer grants a further period of time) notifies the contracting officer in writing of the causes of delay. The contracting officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when.

in his judgment, the findings of fact justify such an extension, and his findings of fact shall be final and conclusive on the parties.

11. *Definition of Net Usable Space.*

"Net usable space" is a term meaning the area to be leased for occupancy by Federal personnel and/or equipment. It is determined by:

a. Computing the inside gross area of the space by measuring from the normal inside finish of exterior walls, or the room side finish of fixed corridor and shaft walls, or the center of tenant separating partitions.

b. Making no deductions for the columns and projections enclosing the structural elements of the building.

c. Deducting from the gross area the following, including enclosing walls when applicable:

(1) Toilets and lounges

(2) Stairwells

(3) Elevators and escalator shafts

(4) Building equipment and service areas

(5) Entrance and elevator lobbies

(6) Stacks and shafts

(7) Fully enclosed convectors when the housing rests on the floor and each end abuts a column or wall.

(8) Corridors in place: If the corridor system in and outside the gross area does not provide ready access to all rooms required, a deduction for corridors will be made in amount equal to 10% of the remaining gross area after deducting (1) to (7) above. The area of corridors within the gross area would apply against the 10% factor.

NOTE: For warehouse and storage type space, no deductions will be made for toilets and the 10% corridor factor will not apply.

General Provisions.

a. Included with the space as computed above shall be the right to use, at no additional cost, the appurtenant areas and facilities deducted from measurement which are necessary to the full utilization of the net usable space by the Government.

b. Space offered for lease to the Government must contain the required square foot net usable area as identified above, and upon delivery, the actual number of net usable feet of space delivered will be determined by mutual field measurement. Payment will be made on the basis of actual measurement but not to exceed the amount required by the solicitation.

12. *Special Conditions Relating to Building to be Erected by Bidder.*

a. *Requirement.* Each year since 1963 the following provision has been included in the Independent Offices Appropriations Act:

> "No part of any appropriation contained in this Act shall be used for the payment of rental on lease agreements for the accommodation of Federal agencies in buildings and improvements which are to be erected by the lessor for such agencies at an estimated cost of construction in excess of $200,000 or for the payment of the salary of any person who executes such a lease agreement: Provided, That the foregoing proviso shall not be applicable to projects for which a prospectus for the lease construction of space has been submitted to the Congress and approval made in the same manner as for the public buildings construction projects pursuant to the Public Buildings Act of 1959."

b. *Buildings and Improvements to be Erected or Altered.* In the event a bidder offers (1) a new building to be erected, or (2) an existing building to be extended or added to (see

c(2)(c), below) such bid shall remain open for acceptance by the Government for 120 days beyond the date for bid acceptance elsewhere specified in this solicitation, in order to afford the Government adequate time to prepare and submit to the appropriate Committees of Congress for approval, the prospectus required by the Act quoted in a, above.

c. *Definition of Existing Buildings, Extension, and Additions.*

(1) For the purpose of this solicitation, buildings, extensions or additions "which are to be erected by the lessor" do not include:

(a) Buildings, extensions, or additions, construction of which is substantially completed prior to date of the solicitation.

(b) New buildings, or extensions of and additions to existing buildings the construction status of which, on the date of issuance of the solicitation, met all of the following conditions:

i. Title to the site was vested in the offeror or he possessed such other interest in and dominion and control over the site to enable starting construction.

ii. Design was complete.

iii. Construction financing fully committed.

iv. A building permit for construction of the entire building, extension or addition had been issued.

v. Actual construction is currently in progress or a firm construction contract with a fixed completion date has been entered into.

(2) Offerors shall indicate, by checking the appropriate box in the space provided below, the construction status of the building, extension, or addition offered in response to this solicitation.

(a) ☐ Construction substantially completed on or before the date of the solicitation, (see c(1)(a), above).

(b) ☒ Buildings, extensions or additions under construction on date of the solicitation where the work has progressed to the stage specified in c(1)(b), above.

(c) ☐ Buildings, extensions, or additions to be erected by offeror.

(3) Offerors offering new buildings or existing buildings being extended or added to, where the construction, extension, or additional work has progressed to the stage specified in c(1)(b), above, shall furnish as part of the offer a certified copy of the building permit together with a statement that conditions c (1) (b)i thru iii, and v, above, have been met. Offerors shall furnish additional information with respect to the status of construction, extension, or addition as may be requested by the Government after opening of offers.

d. *Estimated Construction Cost Less Than $200,000.* The provisions of this paragraph do not apply to buildings or improvements to be constructed, extended or added to at an estimated construction cost of $200,000 or less. The "estimated construction cost" is defined to include fair market value of the site, plus estimated cost of design, construction, and construction supervision. If the space offered for lease to the Government is less than the entire building, and the estimated cost of construction in the building, extension, or addition (or portion thereof) is $200,000 or less, the offeror shall state the estimated cost in the space provided below:

Estimated Cost of Construction $

The Government reserves the right to make its own estimate of the cost of construction and the Government's estimate shall govern in the consideration of the offers. The offeror shall furnish such information in support of his estimate of construction cost as may be requested by the Government.

GATEWAY CENTER CORPORATION
(Name of Offeror)

By:

(Name)

Pres.
(Title)

13. *Award Factors:*

a. Space shall be offered on an annual square foot cost rather than on an overall per annum or monthly rate, and price evaluation and award will be made on the basis of the lowest annual per square foot cost to the Government and not on the lowest overall rental cost.

b. All offers will be analyzed and comparatively evaluated. Award will be made to that responsible offeror whose offer, conforming to the Solicitation for Offers, will be most advantageous to the Government, price and other factors considered.

c. In determining which offer will be most advantageous to the Government, the Contracting Officer will consider the following factors, in addition to the rental proposed and the conformity of the space offered to the specific requirements of this Solicitation for Offers.

1. Susceptibility of the design of the space offered to efficient layout and good utilization.

2. The effect of environmental factors, including the physical characteristics of the building and the area surrounding it, on the efficient and economical condut of agency operations planned for the requested space.

3. Availability and cost of satisfactory public transportation including frequency and quality of commuter service, number of transfers required to reach space from residential areas, and length of time required to reach transfer points.

4. Adequate dining facilities operated on a nonsegregated basis, shall be available within a distance of 1,000 feet from the offered space.

5. Availability of public parking facilities within a reasonable distance from the offered space.

6. The availability of adequate housing for low and middle income employees within a reasonable proximity of the space offered and/or ready accessibility of the space from other areas of the metropolitan area.

14. *Parking:*

Offerors are required to complete all information on parking for Federal employees under paragraph 8 of the attached Proposal to Lease Space to the United States of America, GSA Form 1364.

Sufficient off-street parking must be available for employees. Offerors shall indicate in their offer the following:

a. The total number of off-street parking spaces directly related to or under the control of the offeror for the entire occupancy of the building in which the space is offered.

b. The number of parking spaces that will be allocated for Government employees.

c. Whether the parking spaces will be provided free of charge or what the maximum monthly charge per space will be. (The Government will not collect from employees or be responsible for the payment of any parking charges).

15. In no event shall the offeror enter into negotiations concerning the space leased or to be leased with representatives of Federal agencies other than officers and employees of General Services Administration.

16. The successful offeror will not be reimbursed for any services not provided for in the lease, including but not limited to repairs, alterations or overtime services, nor will any rental be paid for occupancy in whole or in part except for the lease term specified in the award or lease executed by General Services Administration, unless approved in advance by the contracting officer.

AMENDMENT NO. 1 TO SOLICITATION FOR OFFERS NEG(70)-63 PHILADELPHIA, PA.

The Purpose of This Amendment is to Make the Following Changes:

1. *Schedule A*

Page 3 — *Tax Escalation*—1st paragraph, third line, after the word "years" the following should be added: "(if the Government exercises the renewal option)".

Page 4 — *Operating Costs Escalation*—1st paragraph, second line, the words "first twenty (25) years" should be modified to read "first twenty-five (25) years (if the Government exercises the renewal option)".

Page 8 — *Environmental Requirements*—3rd paragraph, 1st line, the word "separate" should be substituted for the word "dedicated".

2. *Schedule C*

Page 1 — Paragraph 1.a.(2) *Special Power*, the following should be added to the last line therein: "unless such power failure originate at the central distribution point and the interrupted power service is not within the lessor's control or fault".

3. *Schedule D*

Page 2 — *Delivery and Condition of Premises*—the following provision should be added: "The Government shall have the right at its option to occupy the space progressively in suitable units

provided such space is ready for use and occupancy as determined by the Government".

Page 2 — *Escalator Clauses*—should be modified to read as follows: "Offers or bids containing escalator clauses except those stated in Schedule A, paragraph 7 will not be considered".

Pages 4 & 12 — Paragraphs 9 and 14 should be combined to read as follows:

Parking for Employee Vehicles

a. Offeror shall make available for Government employees a pro rata number of parking spaces prescribed for the building by zoning regulations in effect as of the date of this solicitation, based on the percentage of the total amount of space in the building occupied by the Government. If applicable zoning regulations do not require onsite parking or parking within a specified distance from the building, this is to be indicated in paragraph 8 of the proposal to lease space.

b. In event offerors have parking available for employee use, even though not required by zoning regulations, offerors shall indicate in paragraph 8 of the proposal to lease space the following additional information:

1. The total number of off-street parking spaces directly related to or under the control of the offeror for the entire occupancy of the building in which the space is offered.
2. The number of parking spaces that will be allocated for Government employees.
3. Whether the parking spaces will be provided free of charge or what the maximum monthly charge per space will be during the lease term, and the number of parking spaces that will be made available. (In event parking

spaces are to be furnished on a fee basis, the Government will not collect from employees nor be responsible for the payment of any parking charges.)

4. If the offeror will charge employees for use of the parking spaces, he should indicate whether he will lease the spaces as a unit to an employees' association, and if so, how much will he charge the association per month.

5. The monthly charge per space, or the charge for the spaces as a unit, which shall prevail during the lease term in event the lessor agrees under the terms of the Government lease to provide parking spaces for employee use on a fee basis.

One copy of this Amendment should be attached to each offer, after acknowledging receipt by signing in the space provided below. If offer has been submitted, an acknowledged copy of this Amendment should be submitted separately.

.....

.....

AMENDMENT NO. 2 TO SOLICITATIONS FOR OFFERS

NEG(70)-63

PHILADELPHIA, PENNSYLVANIA

THE PURPOSE OF THIS AMENDMENT IS TO MAKE THE FOLLOWING CHANGE:

1. *Schedule D*

Page 11 — Delete sub-paragraph 13.(c)(4), Schedule D, and substitute the following sub-paragraph, 13.(c)(4), Schedule D.

13.(c)(4) — The availability of dining facilities operated on a non-segregated basis within a reasonable distance from the offered space.

One copy of this Amendment should be attached to each offer, after acknowledging receipt by signing in the space provided below. If offer has been submitted, an acknowledged copy of this Amendment should be submitted separately.

.....

.....

October 1, 1970

INDEX.

	Page
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	2
STATEMENT OF THE ISSUES	5
STATUTES INVOLVED	6
STATEMENT OF THE CASE	7
ARGUMENT	11
I. The Decision of the Court Below Is Completely Consistent With the Standing Doctrine as Enunciated by This Court	11
II. The Decision of the Court Below Does Not Conflict With Any Other Circuit Court Decision	12
III. Judicial Review of Illegal Agency Action Does Not Unduly Burden the Court	14
IV. The Legality of the Lease Transaction Is Controlled by the I. O. A. A. of 1970: It Is Unaffected by Subsequent Legislation	15
V. This Case Is Not Ripe for Review by Certiorari	17
CONCLUSION	17

TABLE OF CASES CITED.

Page

Ass'n. Data Processing Serv. Organization, Inc. v. Camp, 397 U. S. 150 (1970) 11, 14

Ballerina Pen Co. v. Kunzig, 433 F. 2d 1204 (D. C. Cir. 1970) 13, 14

Barlow v. Collins, 397 U. S. 159 (1970) 11, 14

Brotherhood of Locomotive Fireman and Enginemen v. Bangor & Aroostook R. R., 389 U. S. 327 (1967) 17

Flast v. Cohen, 392 U. S. 83 (1968) 11

Friend v. Lee, 221 F. 2d 96 (D. C. Cir. 1955) 13

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U. S. 251 (1916) 17

Hurd v. Ill. Bell Tel. Co., 234 F. 2d 942 (7th Cir. 1956), cert. den. sub nom. Seybold v. Western Elec. Co., 352 U. S. 918 (1956) 4

Investment Company Institute v. Camp, 401 U. S. 617 (1971) 11

Perkins v. Lukens Steel Co., 310 U. S. 113 (1940) 11

Robert F. Simmons & Associates v. United States, 360 F. 2d 962 (Ct. Cl. 1966) 16

Scanwell Labs, Inc. v. Shaffer, 424 F. 2d 859 (D. C. Cir. 1970) 12, 13

Sierra Club v. Morton, 405 U. S. 727 (1972) 11

Smuck v. Hobson, 408 F. 2d 175 (D. C. Cir. 1969) 4

Superior Oil Co. v. Udall, 409 F. 2d 1115 (D. C. Cir. 1969) 13

MISCELLANEOUS.

	Page
Administrative Procedure Act, section 10	6
Federal Procurement Regulation, 41 C. F. R. § 1-3.805-1	6
Federal Property and Administrative Services Act, 41 U. S. C. § 252-53	6, 9
Federal Rules of Civil Procedure, Rule 24(a)	3
Independent Office Appropriations Act of 1970, 83 Stat. 1221.1	5, 6, 8, 15
Public Buildings Act of 1959, 40 U. S. C. § 606	6, 15
Public Buildings Act Amendments of 1972	5, 6, 16
28 U. S. C. § 1254(1)	2, 3
41 U. S. C. § 11(a)	15
United States Constitution:	
Article III	4, 15
Fifth Amendment	6, 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-180.

GATEWAY CENTER CORPORATION,
Petitioner,

AND

ROBERT L. KUNZIG, ADMINISTRATOR,
GENERAL SERVICES ADMINISTRATION, *et al.*

v.

JOHN W. MERRIAM,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The petition correctly sets forth the opinions below except to the extent that Petitioner infers by the use of the word "defendants" that it was a party to any proceedings in this case prior to June 28, 1973. Until that date (more than sixty days after the last proceeding in the Circuit Court) the only defendants were the government officials and the General Services Administration (hereinafter referred to as "Government Respondents").

JURISDICTIONAL STATEMENT.

Respondent respectfully suggests that this Court lacks jurisdiction to grant certiorari, because Petitioner is not a "party" within the meaning of 28 U. S. C. § 1254(1). That statute confers jurisdiction to review this decision of the Circuit Court:

> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . . .

In September, 1971 Respondent commenced this suit against the Government Respondents alleging that they violated a statutory mandate in the awarding of a lease valued in excess of fifty million dollars. The complaint alleges the Government Respondents accepted the offer with full knowledge of the fact that Petitioner had made false statements of material facts in its offer. (Supplemental Appendix 18a-32a). Respondent seeks the cancellation of the lease and a resolicitation of offers limited to those offerors who were qualified as of the date the original period closed. No claim for relief is made against Petitioner, at least in this lawsuit.

Following the institution of the suit numerous proceedings in the district court were conducted between the Respondent and the Government Respondents and on June 26, 1972 the district court dismissed Respondent's complaint on the motion of the Government Respondents for summary judgment. (Supplemental Appendix 1a-12a). An appeal followed and protracted appellate proceedings ensued between Respondent and Government Respondents in the United States Court of Appeals for the Third Circuit. (Supplemental Appendix 13a-17a). The case was remanded to the district court on May 8, 1973. On June 26, 1973, Petitioner moved to intervene as a party defendant, which

motion was granted on June 28, 1973. One month later Petitioner, the intervenor-defendant, filed this petition.

Respondent submits that the Petitioner does not have sufficient status as a "party" within the meaning of 28 U. S. C. § 1254(1) to justify the filing of this petition. For nearly two years this case has been in the federal courts. During that time Respondent and the Government Respondents have pursued basically, the resolution of one question: the Respondent's standing as a unsuccessful offeror to bring this action. Throughout the protracted litigation on this question in both lower courts, Petitioner did not seek to be heard (even as an amicus curiae). Since Petitioner was not a "party" at any point in this litigation to the resolution of the issue now sought to be reviewed, it cannot properly invoke the jurisdiction of this Court to grant the writ.

The limited basis on which Petitioner sought intervention in the district court was for the purpose of protecting its interest in the lease which Respondent seeks to have invalidated (Supplemental Appendix 33a-34a). Petitioner's intervention as of right (F. R. C. P. 24(a)) is indeed appropriate, since the litigation is proceeding to a determination on the merits. Petitioner's motion does not remotely suggest the possibility that it has an interest in the question of standing in government contract cases. Therefore, in no sense can Petitioner be considered a "party" to the decision for which review has been sought.

Significantly, the Government Respondents have not filed a petition with this Court and have refrained from joining with Petitioner in its request. The Government Respondents' failure to do either, after vigorously contesting the issue in the lower court suggests that they now acknowledge that they have obtained appellate consideration sufficient to protect their interests. Indeed, the only party having an interest in whether an unsuccessful offeror

has standing to contest the legality of a contract award is the General Services Administration.

Finally, Petitioner makes no claim that the Government Respondents' representation on this issue was or is inadequate, *Smuck v. Hobson*, 408 F. 2d 175 (D. C. Cir. 1969) or that important interests of Petitioner would be prejudiced by the failure of the Government Respondents to seek review by this Court, *Hurd v. Ill. Bell Tel. Co.*, 234 F. 2d 942 (7th Cir. 1956), *cert. den. sub nom. Seybold v. Western Elec. Co.*, 352 U. S. 918 (1956). Whatever important interests Petitioner possesses (which are not otherwise foreclosed by its fraud and wrongdoing) relate to the merits of the controversy, and not to the issue of standing.[1]

---

1. The answer to the complaint which Petitioner filed admitted that the court has jurisdiction over this controversy (Supplemental Appendix 36a). Standing, of course, relates to the case or controversy requirement of Article III of the United States Constitution. Thus, the position which Petitioner takes here is the complete reverse of the concession made in the district court.

STATEMENT OF THE ISSUES.

1. Whether Respondent, an unsuccessful offeror of office space to the government has standing to challenge the Government Respondents' award of a twenty year lease to Petitioner, on the grounds that the award was illegal because it violated the express terms of an Act of Congress and because the successful offeror falsely represented the existence of material facts with the knowledge of the Government Respondents?

2. Whether the Government Respondents' unlawful and unauthorized award of a lease to Petitioner in violation of the Independent Offices Appropriations Act of 1970 (which was a limitation on the authority of the Government Respondents to make this award) was ratified by the passage of the Public Building Act Amendments of 1972?

STATUTES INVOLVED.

Petitioner has correctly stated that the statutes involved are the Public Buildings Act Amendments of 1972 (Appendix 16a), section 10 of the Administrative Procedure Act (Appendix 4a) and the Federal Property and Administrative Services Act, 41 U. S. C. § 252-53 (Appendix 1a-2a).

The Independent Office Appropriations Act of 1971 and 1972 (Appendix p. 10a, 13a) have nothing to do with this litigation. Respondent's complaint arises under the Independent Office Appropriations Act of 1970, 83 Stat. 1221.1 and the provisions of the Public Buildings Act of 1959 referred to therein (Supplemental Appendix 21a). These statutes are set forth in Respondent's Supplemental Appendix at 39a-40a.

The Fifth Amendment to the Constitution of the United States and Federal Procurement Regulation, 41 C. F. R. § 1-3.805-1 have never been involved in these proceedings and are irrelevant.

STATEMENT OF THE CASE.

Respondent, the owner of an office building in Philadelphia, was one of five offerors who responded to a government solicitation, dated September 30, 1970, to lease approximately 314,000 square feet of office and related space for use by federal agencies. Respondent's submission, as finally negotiated, offered space in an existing building, whereas Petitioner's offer contemplated the construction of a new building costing in excess of $10,000,000. The Government Respondents accepted Petitioner's offer despite the fact that the selection of Respondent would have saved the government several million dollars over the life of the twenty-year lease.[2] Additionally, the Department of Housing and Urban Development was already a tenant in Respondent's building occupying nearly one-third of the total space required by the solicitation. The selection of Respondent's offer thus had the added advantage of saving the cost of relocating HUD (Supplemental Appendix 21a).

The award to Petitioner was made on February 18, 1971. On the following day, Respondent protested the award to the General Accounting Office. On September 16, 1971, after seven months of consideration, the General Accounting Office advised Respondent that it would not rule on his protest (Appendix 20a-21a).[3] On the same day, Respondent commenced this action. The complaint alleges

---

2. The Government agreed to pay $2,316,000 annually to Gateway on February 18, 1971. Subsequent offers to lease additional space for more than $330,000 annually were accepted subsequently.

3. On March 17, 1972 the General Accounting Office rendered a decision on Respondent's protest, the district court having ordered that all proceedings would be stayed until it did so. In that decision the GAO found that the agreement to lease was improper (Appendix 19a). See text, *infra*.

that the Government Respondents acted capriciously, arbitrarily and illegally, in accepting Petitioner's offer.

The gravamen of the complaint is that the Government Respondents violated the Independent Offices Appropriations Act of 1970 (hereinafter I. O. A. A. of 1970) which prohibits the General Services Administration from paying rent for the leasing of space for the accommodation of federal agencies in a building which is to be erected by the lessor for such agencies, where the estimated cost of construction exceeds $200,000[4] (Supplemental Appendix 18a-22a). Alternatively, the complaint alleges that the Government Respondents, without congressional authorization, interpreted the I. O. A. A. of 1970 so as to permit the awarding of this lease to Petitioner without the prior approval of Congress as was required by that Act and moreover counseled Petitioner in the circumvention of the Act by the use of certain administrative criteria known as "the five points" (Supplemental Appendix 22a-24a). Finally, Respondent alleges that not only did the Government Respondents permit Petitioner to satisfy the five points (rather than to adhere to the I. O. A. A. of 1970) but accepted Petitioner's offer knowing that it had not complied with the five points and, more significantly, knowing that Petitioner had falsely represented the existence of certain facts by certifying that it had complied with the five points (Supplemental Appendix 24a-30a).

The complaint seeks a declaration that the acceptance of Petitioner's offer was null and void and requests the court to order GSA to reconsider only those offers which were responsive to the solicitation on the date that the bid period closed (Supplemental Appendix 31a). On Novem-

4. The purpose of the statute is to avoid having the government finance the construction of a privately-owned building with the security of a long-term lease.

ber 19, 1971,[5] the Government Respondents filed a motion for summary judgment.[6]

On February 7, 1972, the district court stayed all proceedings and ordered the General Accounting Office to decide Respondent's protest which had been then pending for almost one year (Supplemental Appendix 5a). On March 17, 1972, the GAO announced its decision on the protest. It stated that the Government Respondents' award of the lease to Petitioner was "*. . . improper by reason of Gateway's [Petitioner] non-compliance with some of the criteria as of the date specified. . . .*" (Appendix 33a) (Emphasis added.) With respect to the Government Respondents' administration of the Appropriation Act in the context of this protest, the GAO stated that to support the position of the Government Respondents, "*. . . would sanction a complete evasion of the Appropriation Act Limitation.*" (*Ibid.*) (Emphasis added.) In spite of these findings, the GAO declined to order any action to rectify the improprieties in the lease award; thus, the matter returned to the district court for consideration.

On June 26, 1972, the district court granted the Government Respondents' motion for summary judgment and

---

5. Petitioner's assertion on page 5 of the Petition that the motion for summary judgment that was filed on November 1, 1971 is erroneous (Supplemental Appendix 3a).

6. Petitioner's statement that there was an allegation by Government Respondents that the issue was moot is erroneous. This issue was *not* raised at any time before the district court in 1971 and 1972 (Petition, p. 5).

Petitioner's discussion of 41 U. S. C. § 252-53 in its statement of the case is inappropriate (Petition, p. 5). The question of whether or not GSA should have formally advertised for bids as opposed to proceeding to negotiate is not before this Court. That question was not raised in the complaint, nor referred to in the Government Respondent's motion for summary judgment. There is nothing in the record that would indicate why GSA proceeded with negotiation rather than advertising, and Petitioner's speculations as to why this was done are irrelevant.

dismissed the complaint on the ground that Respondent lacked standing to sue. On appeal to the United States Court of Appeals for the Third Circuit, that court reversed the district court on February 16, 1973. The petition for rehearing filed by the Government Respondents was denied on April 27, 1973, and the case was remanded to the district court (Supplemental Appendix 17a). Petitioner intervened as a party defendant on June 28, 1973 filed its answer to Respondent's complaint on July 24, 1973, and petitioned this Court for certiorari on July 26, 1973 (Supplemental Appendix 12a).

ARGUMENT.

I.

The Decision of the Court Below Is Completely Consistent With the Standing Doctrine as Enunciated by This Court.

Petitioner advances *Perkins v. Lukens Steel Co.*, 310 U. S. 113, which was decided in 1940, as a decision of the Supreme Court with which the opinion of the Court below conflicts. In its enthusiasm for *Perkins*, Petitioner has failed to take into account the dramatic metamorphosis in the jurisprudence standing, brought about by this Court's historic decision of *Flast v. Cohen*, 392 U. S. 83 (1968). Article III requires only that a litigant "allege such a personal stake in the outcome of the controversy" so as to assure concrete adversity in the presentation of the issues: injury in fact. *Flast, supra* at 99. The Court's subsequent decisions in *Ass'n. Data Processing Serv. Organization, Inc. v. Camp*, 397 U. S. 150 (1970), *Barlow v. Collins*, 397 U. S. 159 (1970) and *Investment Company Institute v. Camp*, 401 U. S. 617 (1971) have employed the criteria of "injury in fact" in a variety of applications and have broadened the concept of injury to include non-economic injury. However, economic injury, such as Respondent has suffered, has "long been recognized as sufficient to lay the basis for standing, with or without a specific statutory provision for judicial review." *Sierra Club v. Morton*, 405 U. S. 727, 733-34 (1972).

Taken together, these cases established the proposition that a litigant will have standing (1) who is injured in fact (2) and who can argue that he is within the zone of interests of the statute which he claims is violated. Both the circuit and the district courts held that Respondent had been injured in fact when the Government Respondents awarded

Petitioner the lease. Not only was Respondent deprived of a potentially beneficial business relationship by the wrongful conduct of the Government Respondents (as found by both courts) but also on the economic injury sustained in the termination of a presently advantageous relationship which Respondent had with the government (landlord-tenant) (Appendix 81a). Respondent satisfies the zone of interests requirement because the procurement statutes were certainly not drawn solely for the benefit of the government. G. S. A.'s continuing ability to secure advantageous contracts depends upon there being "full and free competition" (Appendix 80a). Contracts and leases awarded unlawfully and on the basis of false statements of fact confer on the unsuccessful offeror an interest, if not a right, to seek judicial redress for the damage sustained thereby.

II.

The Decision of the Court Below Does Not Conflict With Any Other Circuit Court Decision.

Two Circuits have considered the question of the standing of a person who unsuccessfully offers to do business with the goverment: the Third Circuit in the instant case, and the District of Columbia Circuit in *Scanwell Labs, Inc. v. Shaffer*, 424 F. 2d 859 (D. C. Cir. 1970). The *Scanwell* decision was nothing more than an application of the classic doctrine of standing in the context of government contract litigation. It held that a disappointed bidder "has standing to challenge the illegal grant of a contract to another." *Id.* at 870. In a lengthy well-reasoned opinion, that court held that the plaintiff has a "prospective beneficial relationship" when he submits an offer to do business with the government. He suffers economic injury when that potential relationship is frustrated by the award of a contract

to another. *Scanwell, supra* at 870. The court finds that unsuccessful bidders are within the umbrella of interests served by the procurement statutes because the bidder who sues will "... satisfy the public interest in having agencies follow the regulations which control government contracting." *Id.* at 864. See, *Superior Oil Co. v. Udall*, 409 F. 2d 1115, 1120 (D. C. Cir. 1969) (opinion by Burger J. holding that there must be "steadfast compliance" with the procurement laws). The *Scanwell* Court concluded that:

> The public interest in preventing the granting of contracts through arbitrary or capricious action can properly be vindicated through a suit brought by one who suffers injury as a result of the illegal activity. *Id.* at 864

Subsequent decisions of that court and others cited in the Petition (page 9 fn. 1) reinforced the application of the standing doctrine to government contract litigation. See, *e.g., Ballerina Pen Co. v. Kunzig*, 433 F. 2d 1204 (D. C. Cir. 1970).

Petitioner draws an illusory distinction between "advertised" bids and "negotiated" contracts based upon an earlier decision of the District of Columbia Circuit in *Friend v. Lee*, 221 F. 2d 96 (D. C. Cir. 1955). The *Scanwell* Court draws no such distinction which is obvious from the following quotation, from which Petitioner quoted only three lines (Petition, p. 14):

> The point on which we distinguished that case [*Friend*] is that here we have a situation in which explicit requirements of the bid were waived by the agency; this results in an allegation of *arbitrary and capricious misconduct*, an allegation not made in *Friend*. (Emphasis supplied.) *Scanwell, supra* at 869 fn. 10.

Here, of course, the complaint alleges not only arbitrary and capricious misconduct by the Government Respondents, but the making of an award knowing that the successful offeror had misrepresented material facts and that the successful offeror was counseled in the circumvention of the statute which was allegedly violated by the Government Respondents (Supplemental Appendix 23a). These allegations are sufficient to bring the instant case within *Scanwell*. There simply is no "sole [or any] distinction" between *Friend* and *Scanwell* based on negotiated versus advertised contracts (Petition, p. 14).

III.

Judicial Review of Illegal Agency Action Does Not Unduly Burden the Court.

It is specious to argue that the Respondent, who was economically damaged, does not have the right to challenge acts done in violation of a statutory mandate because to do would disrupt the government procurement process (Petition, p. 15). Here, there is not one shred of evidence of disruption of the procurement process. Even if there were, the Courts cannot stand by idly in the face of government misconduct. On the contrary, the judiciary ". . . must require that creating, enabling and empowering legislation is not desecrated beyond all possible recognition in the name of the public welfare and interest." *Ballerina Pen Co., supra* at 1208. The Courts must continue to protect the public "from excesses which hurdle the barrier set up by the creating statute and which allow decision-making, not on the basis of Congressional guidelines, but instead on the basis of personal insight, prejudice, predilection, or perhaps even visceral reaction". *Ibid.* This observation is particularly appropriate in a case of this kind where fraud is alleged.

It comes with some ill-grace to say in this era that the courts are unable to accommodate themselves to litigation which is designed ultimately to protect the public from government excesses (Petition, pp. 17-18). Indeed, such a position counters the trend established by this Court in expanding the role of judicial review of agency action. See, *e.g. Data Processing, supra* at 154: "Where statutes are concerned, the trend is towards enlargement of the class of people who may protest administrative action," and *Barlow, supra* at 166: "Indeed, judicial review of such administrative action is the rule, and non-reviewability is an exception which must be demonstrated."

IV.

The Legality of the Lease Transaction Is Controlled by the I. O. A. A. of 1970: It Is Unaffected by Subsequent Legislation.

The basic statute regulating government contracting is found at 41 U. S. C. § 11(a):

> No contract or purchase shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment.

The leasing authority of the G. S. A. was greatly restricted by the I. O. A. A. of 1970 (Supplemental Appendix 39a-40a). That act forbids the use of any appropriation for the payment of rental in buildings to be built by the lessor for the accommodation of federal agencies where the estimated cost exceeds $200,000, unless congressional approval is first sought in accordance with the provisions of the Public Buildings Act of 1959, 40 U. S. C. § 606 (Supplemental Appendix 39a-40a). The I. O. A. A. of 1970 is an absolute bar on lease agreements of this kind, unless prior congressional approval is obtained. Concededly, no ap-

proval was sought by the Government Respondents for the award of a lease to Petitioner who built a building costing in excess of $10,000,000 and which government agencies house almost exclusively. In *Robert F. Simmons & Associates v. United States*, 360 F. 2d 962, 965 (Ct. Cl. 1966) this same language was construed as prohibiting the G. S. A. from creating a binding contract "in the absence of prior congressional approval." Petitioner argues that since no money was expended under the Act for the payment of rent, the Act has no application to this controversy. Plainly, the contention is without merit. If the Act were a limitation on the authority of the GSA to make a contract in 1971, that infirmity is not cured by the fact that no money was paid under the lease.

Next, Petitioner states that Respondent complains that the contract violates the Public Building Act Amendments of 1972, which became effective on June 16, 1972. The complaint made no such contention; indeed, the Act was not even in existence at the time the complaint was filed. The new Act may become an issue in further proceedings in the district court, but a consideration of this question is premature. The circuit court merely decided that the passage of the Public Building Act Amendments of 1972 did not moot the controversy (A. 84a). Furthermore, Petitioner's argument that it has been deprived of property in violation of the Fifth Amendment (Petition, p. 21) is groundless: once again, all that has been decided is the issue of mootness and the Respondent's standing to sue. Until there is a judgment on the merits in Respondent's favor, there will be no taking of Petitioner's property and then, not without a full hearing.

V.

This Case Is Not Ripe for Review by Certiorari.

The present posture of this case is that the Third Circuit has reversed the district court's order granting the Government Respondents motion for summary judgment. It has held that Respondent has standing, has reinstated the complaint, and has remanded the case for further proceedings in the district court (Appendix 84a). In the absence of some exceptional reason, this Court should not grant certiorari to review a judgment which is interlocutory. No exceptional reason has been advanced by Petitioner, nor does one appear in this record. Lack of finality in the judgment sought to be reviewed is alone a sufficient basis on which to deny the Petition. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U. S. 251 (1916); *Brotherhood of Locomotive Fireman and Enginemen v. Bangor & Aroostook R. R.*, 389 U. S. 327 (1967).

CONCLUSION.

For the foregoing reasons, it is respectively submitted that this Petition for a Writ of Certiorari be denied.

Respectively submitted,

C. Clark Hodgson, Jr.,
Jeanne Ward Ryan,
Attorneys for Respondent,
John W. Merriam.

Of Counsel:
Stradley, Ronon, Stevens & Young,
1300 Two Girard Plaza,
Philadelphia, Pennsylvania. 19102

Supplemental Appendix.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 71-2262.

JOHN W. MERRIAM,

Plaintiff,

v.

ROBERT L. KUNZIG, ETC. ET AL.,

Defendants.

DOCKET ENTRIES.

1 September 16, 1971. Complaint filed.
September 16, 1971. Summons exit.

2 October 5, 1971. Plff's notice of deposition of Allan C. Kirkman, filed.

3 October 13, 1971. Summons returned "on 9/20/71 served U. S. Attorney, Phila., Pa.; on 9/22/71 served L. M. Shipp by certified mail; on 9/22/71 served General Services Admin., Robert L. Kunzig, A. J. Sampson, Attorney General of U. S., Wash., D. C., all by certified mail", filed.

4 October 20, 1971. Plff's notice of deposition of Allan C. Kirkman, filed.

5 November 3, 1971. Plff's notice of deposition of Nowicki & Polillo, filed.

6 November 3, 1971. Plff's notice of deposition of Redevelopment Authority of the City of Phila., filed.

7 November 3, 1971. Plff's notice of deposition of Clarence A. Dockens, filed.

8 November 3, 1971. Plff's notice of deposition of McCullough-Howard Co. & Inc., filed.

9 November 3, 1971. Plff's notice of deposition of University City Science Center, filed.

10 November 9, 1971. Objection of Allan C. Kirkman & The Provident Nat'l Bank to inspection and copying of materials, filed.

11 November 15, 1971. Plff's notice of deposition of Nowicki & Polillo, filed.

12 November 15, 1971. Plff's notice of deposition of McCullough-Howard Co. & Inc., filed.

13 November 15, 1971. Plff's notice of deposition of University City Science Center, filed.

14 November 16, 1971. Motion of Allan C. Kirkman and Provident National Bank for Protective Order and Motion to Quash, Affidavit of Allan C. Kirkman, Brief in support of and Notice thereof, and Certificate of Service, filed.

15 November 16, 1971. Plff's Brief contra Motions of Provident National Bank & Allan C. Kirkman for Protective Order and to quash, filed.

16 November 17, 1971. Plff's Motion under Rule 57, filed.

17 November 17, 1971. Plff's Motion for Preliminary Injunction, filed.

18 November 18, 1971. Motion of Lawrence Polillo and Nowicki & Polillo for Protective Order and Motion to Quash, Brief in support of, and Notice thereof, and Certificate of Service, filed.

19 November 19, 1971. Plff's notice of deposition of Chris G. Papazickos, filed.

20 November 19, 1971. Defts' Motion for Summary Judgment, Memorandum in support of, and Affidavits of L. M. Shipp, Jr. and A. F. Sampson, filed.

21 November 23, 1971. Motion of James M. McCullough and McCullough-Howard & Co, Inc. for Protective Order and Motion to Quash, Brief in support of, Notice thereof, and Certificate of Service, filed.

22 November 23, 1971. Plff's notice of deposition of Chris G. Papazickos, filed.

23 November 23, 1971. Defts' reply to Plff's Motion under Rule 57, filed.

24 November 23, 1971. Defts' reply to Plff's Motion for Preliminary Injunction, filed.

25 November 29, 1971. Objections of James M McCullough and McCullough-Howard Co., Inc., to inspection and copying of materials pursuant to FRCP 45(d), filed.

26 December 8, 1971. Reply Brief of Allen C. Kirkman and The Provident National Bank, filed.

27 December 13, 1971. Plff's Brief contra Defts' Motion for Summary Judgment, filed.

28 December 13, 1971. Affidavit of C. Clark Hodgson, Jr., Esq. re contra Defts' Motion for Summary Judgment, filed.

29 December 13, 1971. Affidavit of John W. Merriam re contra Defts' Motion for Summary Judgment, filed.

30 December 13, 1971. Affidavit of Edward B. Todd, re contra Defts' Motion for Summary Judgment, filed.

31 December 15, 1971. Affidavit of Douglas M. Parker re Plff's protest filed with General Accounting Office of the U. S., filed.

32 December 15, 1971. Deposition of Raymond M. Tate, Jr., filed.

33 December 15, 1971. Deposition of Chris G. Papazickos, filed.

34 December 15, 1971. Pre-Trial oral examination of James McCullough, filed.

35 December 17, 1971. Memorandum of Conference, re Motions for Protective Orders, with approval of Court, filed.

36 December 21, 1971. Pre-trial oral examination of Chris G. Papazickos, filed.

37 December 23, 1971. Defts' reply and supplemental brief & affidavit of A. F. Sampson re: affidavit of 11-1-71 etc., filed.

38 January 7, 1972. Order dtd 1/6/72 that supplemental briefs from Plff. & Defts. supporting positions re Motion for Summary Judgment must be filed by 12 Noon, 1/21/72, filed. 1/10/72 entered and copies mailed.

39 January 21, 1972. Supplemental Affidavit of John W. Merriam, filed.

40 February 8, 1972. Order dtd 2/7/72 that Court will STAY its hand for 30 days, etc., filed. 2/8/72 entered and copies mailed.

41 March 10, 1972. Stipulation and Order extending Order of 2/7/72 to 3/20/72, etc., filed.

— April 21, 1972. Argued sur Defts' motion for summary judgment. . . . C. A. V.

42 April 25, 1972. Stipulation of counsel re decison of Gen. Acct. Office responding to protest filed by Plff., filed.

43 June 23, 1972. Plff's supplemental brief in Opposition to Defts' Motion for Summary Judgment, filed.

44 June 23, 1972. Defts' second supplemental Memorandum in support of the Motion for Summary Judgment, filed.

45 June 26, 1972. Certified copy of General Accounting Office documents, filed.

46 June 26, 1972. Opinion, Hannum, J., and Order DISMISSING Plff's complaint, filed. 6/26/72 entered and copies & notice mailed.

47 June 29, 1972. Notice of Appeal, of Plff., filed. 6/30/72 entered and copies mailed to U. S. Court of Appeals, and U. S. Attorney . . other counsel.

48 June 29, 1972. Copy of Clerk's Notice to U. S. Court of Appeals, filed. 6/30/72 entered and copy to Hannum, J.

— July 19, 1972. Record transmitted to U. S. Court of Appeals.

49 March 7, 1973. Plff deposition of McCullough-Howard Co., by James M. McCullough, filed.

50 March 7, 1973. Plff deposition of University City Science Center by Randall Whaley, filed.

51 March 7, 1973. Plff deposition of Nowicki & Polillo by Lawrence P. Polillo, filed.

52 March 7, 1973. Plff deposition of Provident National Bank by Allan C. Kirkman, filed.

53 March 9, 1973. Joinder of Randall Whaley and University City Science in motion for protective order filed on behalf of Allan C. Kirkman & Provident National Bank, filed.

54 March 9, 1973. Motion of Allan C. Kirkman for protective order pursuant to F. R. C. P. 26(c), brief in support & conclusion, filed.

55 March 9, 1973. Motion of McCullough-Howard & Co. Inc., for protective order pursuant to F. R. C. P. 26(c) brief in support of & notice, filed.

56 March 12, 1973. Govt memorandum, filed.

57 March 12, 1973. Govt motion for protective order, filed.

58 March 12, 1973. Plff answer to defts motion for protective order, filed.

59 March 12, 1973. Plff memorandum of law, filed.

60 March 14, 1973. Answer of McCullough-Howard & Company Inc., & James McCullough to Plff's

motion for leave to take depositions & memorandum of law in opposition thereof, filed.

61 March 15, 1973. Plff motion for leave to take depositions pursuant to rule 27(b), Filed.

62 March 15, 1973. Plff's memorandum of law in support of his motion under rule 27(b), filed.

63 March 15, 1973. Defts answer to plff's motion for leave to take depositions pursuant to rule 27(b), filed.

64 March 15, 1973. Answer of Allan Kirkman & Matthew Weinstein to plff's motion for leave to take depositions pursuant 27(b), filed.

65 March 15, 1973. Memorandum filed by counsel for Lawrence Polillo, of Nowicki & Polillo filed.

— March 15, 1973. Argued sur: plff's motion for leave to take depositions and all defts motion's as filed for protective order—C. A. V.

66 March 23, 1973. Witnesses' brief contra plff's motion for leave to take depositions, filed.

67 April 5, 1973. Certified copy of Order that subpoenas to produce documents & testimony on depositions is stayed pending issuance of mandate of this court, filed.

68 April 5, 1973. Transcript of March 14, 1973 filed.

69 April 6, 1973. Order Denying Plff motion for leave to take depositions, filed. 4-9-73 entered & copies mailed.

70 May 8, 1973. Certified copy of order from U. S. Court of Appeals that judgment of this court

is REVERSED & cause remanded for further proceedings & costs taxed against appellees, filed.

71 May 17, 1973. Plff's notice of deposition of Custodian of Records of First Pa. Banking & Trust Co., filed.

72 May 17, 1973. Plff's notice of deposition of Robert S. Irving, filed.

73 May 17, 1973. Plff's notice of deposition of Nowicki & Polillo, filed.

74 May 17, 1973. Plff's notice of deposition of Asst Vice-Pres. of Provident Nat'l Bank, Allan C. Kirkman, filed.

75 May 17, 1973. Plff's notice of deposition of University City Science Center by Randall M. Whaley, filed.

76 May 17, 1973. Plff's Notice of deposition of James Crawford, filed.

77 May 17, 1973. Plff's notice of deposition of James McCullough, filed.

78 May 21, 1973. Plff's notice of deposition of James Bodine, filed.

79 May 22, 1973. Affidavit of service by Edmund L. Harvey Jr., re: served subpoena on Lawrence Polillo, filed.

80 May 23, 1973. Govt's motion for protective order, memorandum, notice thereof & certificate of service, filed.

81 May 23, 1973. Plff's motion for preliminary injunction, filed.

82 May 24, 1973. Joinder of Randall Whaley & University City Science Center in motion for protective order filed on behalf of USA & Provident National Bank & Allan C. Kirkman & notice thereof, filed.

83 May 24, 1973. Affidavit of Anthony Walton, filed.

84 May 24, 1973. Affidavit of John W. Merriam, filed.

85 May 24, 1973. Motion of Allan C. Kirkman & Provident Nat'l Bank for protective order, notice of filing brief & motion & certificate of service, filed.

86 May 24, 1973. Motion of Lawrence P. Polillo for protective order, notice of filing & motion & certificate, filed.

87 May 25, 1973. Joinder of J. Bodine & The First Penna. Banking & Trust Co. in motion for protective order filed o nbehalf of the USA & others & notice thereof, filed.

88 May 25, 1973. Plff's response to defts' motion for protective order, filed.

89 May 25, 1973. Plff's memorandum in apposition to motion for protective order, filed.

90 May 29, 1973. McCullough-Howard & Co.,'s motion for protective order, notice, brief in support thereof & certificate of service, filed.

91 May 30, 1973. Plff's motion to compel the taking of the deposition of James Crawford notice & certificate of service, filed.

92 May 30, 1973. Plff's memorandum contra motion for protective order filed by non-part witnesses, filed.

93 June 6, 1973. Plff's motion to compel the taking of depositions of First Pennsylvania Banking & Trust Company & James F. Bodine, memorandum of law, notice & certificate of service, filed.

94 June 6, 1973. Answer of McCullough-Howard & Co., Inc., to plff's motion to compel taking of deposition, notice & certificate of service & memorandum in opposition to plff's motion to compel discovery, filed.

95 June 7, 1973. Plff's motion to compel the taking of deposition of Nowicki & Polillo Lawrence Polillo, notice, certificate of service and memorandum, filed.

96 June 7, 1973. Plff's motion to compel taking of deposition of McCullough-Howard Construction Co., notice, certificate of service and memorandum, filed.

97 June 7, 1973. Plff's motion to compel taking deposition of Allan C. Kirkman, notice certificate of service and memorandum, filed.

98 June 12, 1973. Defts' Memorandum in opposition to plff's motion for preliminary injunction, filed.

99 June 20, 1973. Deft's. answer to plff's/ motion to compel taking of depositions, filed.

100 June 21, 1973. Plff's motion to compel the production of documents, memorandum and notice of filing brief and motion, filed.

101 June 22, 1973. Order that motions for protective Orders filed on behalf of General Service Administration, et al are DENIED; further that plff's motions to compel Discovery as to

General Services Administration et al are GRANTED, etc., filed. 6/25/73 entered & copies mailed.

June 25, 1973. ARGUED SUR: Govt's motion for protective Order. C. A. V.

June 25, 1973. ARGUED SUR: Provident National Bank's motion for protective order. C. A. V.

June 25, 1973. ARGUED SUR: Nowicki & Polillo's motion for protective order. CAV.

June 25, 1973. ARGUED SUR: Whaley's and University City's motion for protective Order. CAV.

June 25, 1973. ARGUED SUR: McCullough-Howard's motion for protective order. CAV.

June 25, 1973. ARGUED SUR: Plff's motion to compel taking of deposition of James Crawford—CAV.

June 25, 1973. ARGUED SUR: Plff's motion to compel taking of deposition of First Pennsylvania and James F. Bodine. C. A. V.

June 25, 1973. ARGUED SUR: Plff's motion to compel taking of deposition of Nowick & Polillo. C. A. V.

June 25, 1973. ARGUED SUR: Plff's motion to compel taking deposition of Mcullough-Howard Construction Co. C. A. V.

June 25, 1973. ARGUED SUR: Plff's motion to compel the taking depostiion of Allan C. Kirkman. C. A. V.

June 25, 1973. ARGUED SUR: Plff's motion for preliminary injunction Section A—Denied by the court from the bench. Section B—withdrawn by the plffs.

102 June 29, 1973. Order dtd 6/28/73, with Motion, Stipulation of counsel, and Memorandum of Law, that Gateway Center Corp. be permitted to intervene as party Deft. in this action, filed. 7/5/73 entered and copies mailed.

103 June 29, 1973. Withdrawal of appearance of Obermayer, Rebmann, Maxwell & Hippel, Esqs. and Appearance of Ballard, Spahr, Andres & Ingersoll, Esqs. for Allan C. Kirkman and The Provident National Bank, filed.

104 July 20, 1973. Plff's deposition of George T. Walker, filed.

105 July 23, 1973. Plff's deposition of Nowicki & Polillo, filed.

106 July 24, 1973. Answer of Gateway Center Corporation, filed.

107 July 26, 1973. Deposition of James D. Crawford, filed.

108 July 26, 1973. Notice of deposition of The Colonial Mortgage Service Company to be taken by plff., filed.

109 August 1, 1973. Deposition of Allan C. Kirkman, filed.

110 August 1, 1973. Deposition of Robert S. Krutsick, filed.

111 August 6, 1973. Plff's notice of deposition concerning records of McCullough-Howard Construction Company, filed.

112 August 6, 1973. Order that Motion for Recall of Mandate is DENIED by Gibbons, Circuit Judge, filed. [Certified copy] 8/7/63 Entered and copy to Hannum, J.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 72-1686.

JOHN W. MERRIAM,
Appellant,

v.

ROBERT L. KUNZIG, ETC. ET AL.,
Appellees.

DOCKET ENTRIES.

August 8, 1972. Copy of Notice of Appeal, rec'd July 1, 1972, filed.

Record received July 19, 1972, filed.

Appearance of C. Clark Hodgson, Jr., Stradley, Ronon, Stevens and Young for appellant, filed.

Appearance of Kent Frizzell, George R. Hyde, Eva R. Datz; Dept. of Justice for appellees, filed.

August 11, 1972. Motion by appellant to expedite appeal, in which it states that counsel for appellees does not not object to an expedited hearing of this appeal, although counsel does object to any expedited briefing schedule, filed. (4 copies). Certificate of service attached.

August 25, 1972. Submitted on above motion. CLERK.

August 28, 1972. Order (CLERK) granting appellant's motion to expedite appeal; the briefing schedule required by the Federal Rules of Appellate Procedure is applicable in this case, and the case will be listed, upon completion of briefing, at the earliest convenience of the Court, filed.

September 15, 1972. Appendix, filed.

September 15, 1972. Brief for Appellant, filed.

September 18, 1972. Certificate of service of appellant's brief and appendix by mail on September 18, 1972, filed.

October 18, 1972. Brief for appellees, rec'd October 27, 1972, filed. Proof of service by mail on October 25, 1972 in letter dated October 25, 1972.

October 24, 1972. Acknowledgment of service of appellees' brief on October 20, 1972, filed.

November 11, 1972. Letter, dated November 9, 1972, from Eva R. Datz, Esquire, counsel for appellee, together with enclosure, received for the information of the Court. (2 copies). Proof of service in letter.

November 30, 1972. Reply brief for appellant, filed. (25 cc.).

December 1, 1972. Certificate of service of appellant's reply brief by hand delivery on December 1, 1972, filed.

December 7, 1972. Argued. Coram: Van Dusen, Gibbons and Hunter.

December 11, 1972. Letter, dated December 8, 1972, from Eva R. Datz, Esquire, counsel for appellee, received

for the information of the court. (4 copies). Proof of service in letter.

December 16, 1972. Letter, dated December 16, 1972, from C. Clark Hodgson, Jr., Esq., counsel for appellant, in response to Eva R. Datz's letter of December 8, 1972, received for the information of the Court. (4 copies).

February 16, 1973. Opinion of the Court (Van Dusen, *Gibbons* and Hunter) filed.

February 16, 1973. Judgment reversing the judgment of the District Court, filed June 26, 1972, and the cause remanded for further proceedings, in accordance with the opinion of this Court. Costs taxed against appellees, filed.

February 21, 1973. Bill of costs for appellant, filed. Certificate of service attached.

February 26, 1973. Motion by Federal appellees for leave to extend time for filing petition for rehearing to 14 days (to and including March 16, 1973), filed. (4 cc.). Certificate of service attached.

March 1, 1973. Response by appellant to appellees' motion for extension of time to file petition for rehearing, filed. (4 cc.). Certificate of service attached.

March 1, 1973. Order (Van Dusen, *Gibbons* and Hunter) granting federal appellees' motion for an extension of time to file a petition for rehearing to and including March 16, 1973, filed.

March 16, 1973. Petition by appellees for rehearing, filed. (25 copies). Proof of service in letter dated March 15, 1973.

March 9, 1973. Motion by Allan C. Kirkman, Ass't Vice-Pres. of the Provident National Bank, and the Provident National Bank for protective order pursuant to F. R. C. P., 26(c), filed. (8 cc.). Proof of service rec'd March 14, 1973.

March 9, 1973. Motion by McCullough-Howard and Co., Inc., with brief in support, for protective order pursuant to F. R. C. P., 26(c), filed. (8 cc.). Certificate of service attached.

March 9, 1973. Joinder of Randall Whaley and University City Science Center in motion for protective order filed on behalf of Allan C. Kirkman and Provident National Bank, filed. (8 cc.).

March 12, 1973. Answered by appellant to motion by Allan C. Kirkman and Provident National Bank for protective order, filed. (8 cc.). Certificate of service attached.

March 12, 1973. Answer by appellant to motion of McCullough-Howard & Co., Inc. for protective order, filed. (8 cc.). Certificate of service attached.

March 12, 1973. Answer by appellant to joinder of Randall Whaley and University City Science Center to motion for protective order filed by Provident National Bank, filed. (8 cc.). Certificate of service attached.

March 12, 1973. Memorandum of Law rec'd from appellant in opposition to motions for protective orders filed by Provident National Bank, McCullough-Howard Construction Co. and University City Science Center, filed. (8 cc.). Certificate of service attached.

April 2, 1973. Order (Seitz, Van Dusen, Aldisert, Adams, *Gibbons,* Rosenn and Hunter) staying issuance of subpoenas directed to production of documents and testimony on depositions by Kirkman, Provident Nat'l Bank, McCullough-Howard & Co. and Randall Whaley and University City Science Center pending issuance of the mandate of this Court, filed.

April 2, 1973. Certified copy of above order to C. of D. C.

April 13, 1973. Order Amending Opinion filed February 16, 1973 (Van Dusen, *Gibbons* and Hunter, C.J.), filed.

April 27, 1973. Opinion on Petition for Rehearing (Seitz, Van Dusen, Aldisert, Adams, *Gibbons,* Rosenn and Hunter with separate dissenting opinion sur the denial of the petition for rehearing en banc by Judge *Adams*), filed.

April 27, 1973. Order (Seitz, Van Dusen, Aldisert, Adams, *Gibbons,* Rosenn and Hunter, C.J.) denying the petition for rehearing. Judge Adams dissents from this order, filed.

May 7, 1973. Certified Judgment in lieu of formal mandate issued, filed.

May 7, 1973. Record returned to Clerk of D. C.

May 8, 1973. Receipt for record, filed.

May 17, 1973. Appearance of Wallace H. Johnson and Edmund B. Clerk for appellees, filed.

May 17, 1973. Motion by appellees for Recall and Stay of Mandate, filed (4 copies) service attached.

May 18, 1973. Response by appellant to motion for recall of and Stay of Mandate filed. (4 cc) service attached.

July 26, 1973. Cert filed.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 71-2262.

JOHN W. MERRIAN

v.

ROBERT L. KUNZIG, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, A. J. SAMPSON, COMMISSIONER, PUBLIC BUILDING SERVICE OF THE GENERAL SERVICES ADMINISTRATION, L. M. SHIPP, JR., ASSISTANT COMMISSIONER, SPACE MANAGEMENT OF THE GENERAL SERVICES ADMINISTRATION AND THE GENERAL SERVICES ADMINISTRATION OF THE UNITED STATES OF AMERICA.

COMPLAINT.

COUNT I.

1. The plaintiff, John W. Merriam, an individual, is a taxpayer and citizen of the United States of America residing in Montgomery County, Pennsylvania which is located within the federal judicial district known as the Eastern District of Pennsylvania.

2. Defendant Robert L. Kunzig is the Administrator of the General Services Administration of the United States of America (hereinafter "GSA"). Defendant A. J. Sampson is the Commissioner of the Public Buildings Service of GSA. Plaintiff is informed and believes that L. M. Shipp, Jr. is an Assistant Commissioner of the GSA and at all

times material hereto was the contracting officer for the project described herein. Defendant General Services Administration is the agency of the United States which is charged with the responsibility, *inter alia*, for acquiring, leasing or otherwise providing space to be occupied for government purposes.

3. Jurisdiction of this action is based upon title 28 U. S. C. § 1331, § 1361, §§ 2201-02, title 41 U. S. C. § 11 and title 5 U. S. C. § 702. The matter in controversy exceeds $10,000.00, exclusive of interest and costs.

4. Plaintiff was, at all times material hereto, and is presently the owner of a twelve story office building located at Independence Square, Philadelphia, Pennsylvania and known as the Curtis Building.

5. On September 30, 1970, defendant GSA issued Solicitation for Offers No. NEG(70)-63 for office and related space to a number of prospective offerors in the Philadelphia area, including the plaintiff.

6. The Solicitation invited the prospective offerors to submit offers to defendant GSA to lease approximately 314,000 net useable square feet of office, storage and cafeteria space located in the City of Philadelphia for a term of 30 years with options for earlier renewals to be available for occupancy by July 1, 1972.

7. The Solicitation was designed to accommodate the new regional headquarters of the Departments of Housing and Urban Development, Health, Education and Welfare, Labor, and Office of Economic Opportunity. The need for this space arose in fidelity to a Presidential mandate dated March 27, 1969 to collocate the socio-economic government agencies in order to enhance the efficiency and effectiveness of the federal human resources programs and to improve service to the general public.

8. Plaintiff is informed, believes and therefore avers that during the fall of 1970, defendant GSA received offers from five offerors including Gateway Center Corp. (hereinafter "Gateway") and plaintiff's agent, Richard B. Herman & Co.

9. Plaintiff's agent's offer, as finally negotiated, proposed leasing defendant GSA sufficient space on contiguous floors in the Curtis building to meet government requirements, at the rate of $7.09 per net useable square foot, or an annual rental of $2,173,562.

10. Gateway's offer, as finally negotiated, proposed constructing at a cost in excess of ten million dollars, a fifteen story office building at 36th and Market Streets, in Philadelphia, in which, it was further proposed, that defendant GSA would lease fifteen floors containing 302,000 square feet of space at the rate of $7.67 per net useable square foot, or at annual rental of $2,316,000. The proposal promised completion of the fifteen story building so as to be ready for governmnet occupancy by July 1, 1972.

11. Plaintiff is informed, believes and therefore avers that defendant Sampson prepared a report dated February 18, 1971, recommending to defendant Kunzig that Gateway's offer be accepted. On the same day, defendant Kunzig approved defendant Sampson's recommendation. On the same day, defendant Sampson arbitrarily and illegally accepted Gateway's offer.

12. Gateway's offer was accepted notwithstanding the facts that:

(a) as between Gateway and plaintiff, the latter was the low bidder by nearly $150,000 per year for a twenty year lease;

(b) Gateway's bid offered only 279,000 net useable square feet, whereas plaintiff offered 306,378 square feet; the solicitation requested 314,000 square feet;

(c) The Department of Housing and Urban Development, one of the ultimate tenants, already occupied almost two floors of plaintiff's building, representing 96,643 square feet, which is nearly one-third of the total space required by defendant GSA in the Solicitation. Thus, leasing plaintiff's building offered defendant GSA substantial savings of the costs of relocating the Department of Housing and Urban Development.

13. Defendants' acceptance of Gateway's offer was illegal because it obligated the United States to make payments under the lease and to the lessor, Gateway, in violation of the Independent Offices Appropriations Act of 1970, P. L. 91-556. The Act prohibits GSA from paying rent for leases of space for the accommodation of federal agencies in buildings which are to be erected by the lessor for such agencies where the estimated cost of construction exceeds $200,000, unless the Congress has approved the lease. A true and correct copy of pages 8, 9 and 10, Schedule D, of Solicitation No. NEG(70)-63 which contains on page 8 thereof the text of the statute, are attached hereto as Exhibit "A".

14. Gateway's proposal to erect a fifteen story building at a cost in excess of ten million dollars in which federal agencies will be the sole and exclusive tenants, will commit the United States to make rental payments prohibited by the aforesaid Act, since defendants neither sought nor obtained appropriate Congressional approval.

15. Defendants Kunzig, Sampson and Shipp acted capriciously, arbitrarily and unlawfully because with full

knowledge of the prohibitions of the aforesaid Act, they knowingly and willfully recommended, authorized or were otherwise instrumental in accepting Gateway's offer.

16. Plaintiff, whose offer was responsive to defendants' Solicitation, had a prospective beneficial business relationship with defendant GSA which has been irreparably damaged by defendants' illegal acceptance of Gateway's offer in derogation of his rights. Plaintiff is aggrieved and palpably injured by defendants' action.

COUNT II.

17. Plaintiff incorporates herein by reference thereto paragraphs 1 through 14 of Count I of this complaint.

18. In the alternative, Solicitation No. NEG(70)-63 required each prospective offeror to advise defendant GSA whether its proposal offered space in an *existing building* or whether it proposed the offering of space in a *new building* to be erected, which would necessitate defendant GSA's obtaining Congressional approval as required by the Independent Offices Appropriations Act.

19. Notwithstanding the prohibitions contained in the aforesaid Act, defendants nevertheless, capriciously, arbitrarily and unlawfully specially interpreted the Act by erroneously defining the words ". . . which are to be erected by the lessor . . ."

20. As will more fully appear by reference to Exhibit "A", the defendants by their aforesaid interpretation excluded from the above-quoted statutory language new buildings, the construction status of which, on the date of the issuance of the Solicitation, met the following conditions (hereinafter referred to as the "Five Conditions"):

i. Title to the site was vested in the offeror or he possessed such other interest in and dominion and control over the site to enable starting construction.

ii. Design was complete.

iii. Construction financing fully committed.

iv. A building permit for construction of the entire building . . . had been issued.

v. Actual construction is currently in progress or a firm construction contract with a fixed completion date has been entered into.

21. The language and intent of the Independent Offices Appropriations Act is clear and unambiguous. It prohibits defendant GSA from executing a lease with a lessor who is erecting a building to accommodate federal agencies without first obtaining Congressional approval. In the absence of any statutory authority, direction or mandate from the Congress, the defendants unlawfully inserted in the Solicitation, the foregoing erroneous interpretation.

22. Plaintiff is informed, believes and therefore avers that Gateway did not intend to construct a building for its own purposes without regard to the prospects of a government lease. On the contrary, it intended to erect the building proposed in its offer solely for the purpose of accommodating federal agencies as lessees.

23. Plaintiff is informed, believes and therefore avers that defendants Kunzig, Sampson and Shipp knew in advance of September 30, 1970, the date that the Solicitation was issued, that Gateway did not intend to construct a building unless it was assured of a government lease. Nevertheless, the said defendants for several months prior to September 30, 1970, assisted and counselled Gateway in

the circumvention of the aforesaid statutory prohibition by certifying compliance with the defendants' unlawful interpretation of the Act, the Five Conditions.

24. As a result of the foregoing, defendants Kunzig, Sampson and Shipp unlawfully decided not to submit Gateway's offer to the Congress for approval as mandated by the Act, unlawfully determined that Gateway's offer was responsive to the Solicitation, and unlawfully accepted Gateway's offer because Gateway had certified that the offer complied with the Five Conditions.

25. Plaintiff, whose bid was responsive to defendants' Solicitation, had a prospective beneficial business relationship with defendant GSA which has been irreparably damaged and harmed by defendants' acceptance of Gateway's offer in derogation of plaintiff's rights. Plaintiff is aggrieved and palpably injured by defendants' action.

COUNT III.

26. Plaintiff incorporates herein paragraphs 17 through 24 of Count II of this complaint.

27. In the alternative, defendant GSA unlawfully accepted Gateway's bid which was nonresponsive in a material respect. Gateway's offer and the documentation submitted in connection therewith failed to demonstrate compliance with defendants' Five Conditions which were contained in the Solicitation. A true and correct copy of that portion of Gateway's offer is attached hereto as Exhibit "B".

28. In an attempt to comply with condition (i) (quoted above in paragraph 20), Gateway represented in its bid that it had a beneficial interest in the real estate under an agreement with the University City Science Center (here

inafter UCSC), dated September 23, 1970, which was "in fact, an Agreement of Sale giving [Gateway] beneficial ownership." (Gateway Offer, Exhibit B, page 2.) It further represented that its interest was sufficient to enable it to start construction on September 30, 1970, the date of defendant GSA's Solicitation.

29. The foregoing representations are false. The true facts are:

(a) there is no agreement of sale between Gateway and UCSC dated September 23, 1970. Plaintiff is informed, believes and therefore avers that even at the present time, no such agreement has been concluded;

(b) as of September 30, 1970, neither Gateway nor UCSC owned the real estate upon which Gateway proposed erecting a building. Title was vested in the Redevelopment Authority of the City of Philadelphia (hereinafter "Authority"), and the City of Philadelphia, until April 8, 1971. On that date the Authority conveyed title to the premises to UCSC;

(c) Gateway submitted with its offer a lease dated September 23, 1970 (and not an agreement of sale) between UCSC (landlord) and Gateway (tenant) for a term of 50 years. Paragraph 25 of the lease expressly provided that it was made pursuant to the Redevelopment Contract between the UCSC and the Authority dated November 26, 1965 which expressly provided:

A. in paragraph 14, that UCSC shall not sell or lease any part of the project area without the written consent of the Authority, and

B. in paragraph 18, that construction may not commence until final plans, designs and specifications have been approved by the Authority.

As of September 30, 1970, the Authority had not approved the lease or plans and specifications. Therefore, neither UCSC nor Gateway had the right to commence construction as of that date.

(d) the Authority could not approve Gateway's plans and specifications because they conflict with and violate the Urban Development Plan with respect to the building height and provisions for parking;

(e) Gateway's lease contains a restrictive clause which prohibits the erection of a general office building. Paragraph 6 of the lease provides:

> The Demised Premises shall be occupied and used only for such purposes as will promote, encourage and stimulate scientific research, including research of the natural and social sciences and including provisions for offices and other facilities incidental to or in support of such scientific research. Every sublease shall contain a provision restricting the use as herein provided.

The agencies which defendant GSA proposes to locate in the building are not concerned in any way with scientific research.

30. In an attempt to comply with condition (ii) (quoted above in paragraph 20), Gateway represented that the design of the building which it proposed to construct was complete.

31. The foregoing representation is false. The true fact is that the drawings submitted with Gateway's offer are incomplete, are not the drawings on which the building permit was issued and do not provide the floor space required by the Solicitation. Moreover, there are no me-

chanical drawings, nor are there drawings for the ground floor or penthouse floor of the building.

32. In an attempt to comply with condition (iii) (quoted above in paragraph 20), Gateway represented that construction financing was fully committed. Gateway purported to submit with its offer, a letter of the First Pennsylvania Banking and Trust Co., dated September 16, 1970 which allegedly committed the bank to finance the construction of Gateway's building.

33. The foregoing representation is false. The true fact is that Gateway submitted with its offer a letter dated September 15, 1970 from the Provident National Bank (and not the First Pennsylvania Banking and Trust Company.) The letter does not fully commit Provident to provide the financing, since the commitment is subject to Gateway's supplying to Provident certain unspecified documentation. Neither Gateway nor Provident advised defendant GSA either that the unspecified documentation was supplied or that Provident's conditions had been satisfied.

34. In a attempt to comply with condition (iv) (quoted above in paragraph 20), Gateway represented that a building permit for construction of the "entire building" was issued by the City of Philadelphia on September 30, 1970.

35. The foregoing representation is false. The true facts are:

(a) the building permit for the "entire building", as issued, was invalid, because as of September 30, 1970, the City of Philadelphia held title to a portion of the real estate upon which Gateway proposed to construct its building. Gateway had no understanding, agreement or beneficial interest in those portions of the real estate to which the City held title:

(b) building permit No. 62752 submitted with Gateway's Solicitation indicated that additional build- permits for air conditioning, plumbing and electrical work were required. These additional permits were not supplied to defendant GSA. Gateway could not commence construction on September 30, 1970.

36. In an attempt to comply with condition (v) (quoted above in paragraph 20), Gateway represented in its bid that a firm construction contract was entered into September 30, 1970 between Gateway Center Corporation (owner) and Rosemont Construction Co. (Contractor).

37. The foregoing representation is false. The true facts are:

(a) Gateway Center Corp. and Rosemont Construction Co. have the same address, the same telephone number and have common ownership;

(b) Plaintiff is informed, believes and therefore avers that Rosemont Construction Co. has not undertaken any significant construction for more than ten years and did not have the capacity to do so;

(c) while the contract called for work to commence "immediately", no work had been performed by Rosemont nearly five months later when the bid to Gateway was announced;

(d) the construction contract could not be considered "firm" since the plans and specifications were incomplete as of September 30, 1970, as alleged above in paragraph 31.

38. Defendant Shipp acted unlawfully, arbitrarily and capriciously by:

(a) failing to assure himself and his superiors that acceptance of Gateway's offer was authorized by law;

(b) failing to determine the true facts and circumstances under which Gateway submitted its offer, and

(c) failing to safeguard the interest of the United States in contractual relationships in total dereliction of the duty imposed on him by federal regulations.

39. Defendant Sampson acted capriciously, arbitrarily and unlawfully by:

(a) failing to read the documentation submitted by Gateway in support of its representations;

(b) failing to investigate the patently untrue statements contained in Gateway's offer;

(c) concluding that the bid was responsive on the limited information before him;

(d) by reporting to defendant Kunzig that the building which Gateway proposed to construct was already in existence, when he knew or should have known that the site on which the building would be located was vacant land;

(e) recommending to defendant Kunzig that the Gateway bid be accepted when he knew or should have known that Gateway's offer required Congressional approval in accordance with the Independent Offices Appropriations Act.

40. Defendant Kunzig acted capriciously, arbitrarily and unlawfully by:

(a) approving the recommendation of defendant Sampson that the Gateway bid be accepted when he knew or should have known that the acceptance of Gateway's offer required Congressional approval in accordance with the Independent Offices Appropriations Act;

(b) authorizing defendant Sampson to accept Gateway's offer in contravention of applicable laws and regulations of the United States, and

(c) failing to fulfill his duty to protect the public interest by rejecting the Gateway bid as nonresponsive.

41. Plaintiff, whose bid was responsive to defendants' Solicitation, had a prospective beneficial business relationship with defendant GSA which has been irreparably damaged by defendants' acceptance of Gateway's offer in derogation of plaintiff's rights. Plaintiff is aggrieved and palpably injured by defendants' action.

42. By reason of the foregoing, plaintiff has suffered irreparable damage and harm and will continue to suffer the same in the future. His remedy at law is clearly inadequate.

43. Plaintiff is informed, believes and therefore avers that defendants' illegal acceptance of Gateway's bid requires the execution of a lease between the parties.

44. Unless enjoined by this Court, Gateway and defendant GSA will execute the lease contemplated by the acceptance by defendant GSA of Gateway's offer.

45. Plaintiff is informed, believes and therefore avers that the illegal acceptance by defendant of Gateway's offer or the lease between the parties, or both, contemplate numerous consultations between Gateway and defendant GSA with respect to defendant GSA's particularized requirements and needs in the building which it has or will lease from Gateway. Specifically, plaintiff is informed, believes and therefore avers that the aforesaid lease will require defendant GSA to consult with Gateway with respect to partition requirements of the individual agencies to be housed in the said building.

46. Unless enjoined by this Court, defendant GSA may consult, communicate and otherwise encourage Gateway in the construction of the building to accommodate the federal agencies who will be the sole tenants.

WHEREFORE, Plaintiff, John W. Merriam, respectfully prays the Court, as follows:

(a) to issue an order preliminarily, and after final hearing, permanently enjoining defendant GSA from executing the lease contemplated by the defendants' acceptance of Gateway's offer on or about February, 1971;

(b) to issue an Order preliminarily restraining defendants Kunzig, Sampson, Shipp and GSA and its agents and employees from consulting, communicating, advising, encouraging or otherwise contacting Gateway Center Corp. with respect to its offer or any lease which may have been executed in pursuance thereto, pending the outcome of this litigation;

(c) to declare the acceptance of Gateway's offer, null and void of no binding effect on either party thereto;

(d) to declare the offer of Gateway Center Corp. non-responsive to Solicitation No. NEG(70)-63;

(e) in the alternative, to issue a writ of mandamus, compelling defendant Kunzig to cancel, void or otherwise nullify the acceptance of Gateway's offer, and to declare the same non-responsive;

(f) to direct the defendants to proceed forwith with a reconsideration of the offer of any offeror (excluding Gateway Center Corp.) which was responsive as of October 13, 1970, the date on which the bid period closed;

(g) to direct the defendants to accept only an offer which is responsive to the terms of the Solicitation and to direct that all subsequent proceedings and determinations be conducted strictly in accordance with the applicable federal statutes and the rules and regulations respecting the leasing of space by the United States, and

(h) such further Order as justice and the circumstances of this cause may require.

C. CLARK HODGSON, JR.,
C. Clark Hodgson, Jr.,
Attorney for Plaintiff.

Of Counsel:
STRADLEY, RONON, STEVENS
AND YOUNG,
1300 Two Girard Plaza,
Philadelphia, Penna. 19102

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 71-2262.

JOHN W. MERRIAM,

v.

ROBERT L. KUNZIG, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, A. J. SAMPSON, COMMISSIONER, PUBLIC BUILDING SERVICE OF THE GENERAL SERVICES ADMINISTRATION, L. M. SHIPP, JR., ASSISTANT COMMISSIONER, SPACE MANAGEMENT OF THE GENERAL SERVICES ADMINISTRATION AND THE GENERAL SERVICES ADMINISTRATION OF THE UNITED STATES OF AMERICA.

MOTION TO INTERVENE.

1. GATEWAY CENTER CORPORATION is a Pennsylvania corporation having its principal place of business at 1030 East Lancaster Avenue, Rosemont, Pennsylvania 19010. The GATEWAY CENTER CORPORATION moves this Court to permit it to Intervene as a Party Defendant in this action.

2. JOHN W. MERRIAM, the Plaintiff herein, is an individual residing in Montgomery County, Pennsylvania, which is located within the Federal Judicial District known as the Eastern District of Pennsylvania.

3. The Defendant ROBERT L. KUNZIG is the former Admistrator of the General Services Administration of the United States of America (hereinafter "GSA"). The

Defendant A. J. SAMPSON was formerly the Commissioner of the Public Building Service of the GSA. The applicant is informed, believed and therefore avers that the Defendant L. M. SHIPP, JR., was formerly Assistant Commissioner of the GSA. The Defendant GENERAL SERVICES ADMINISTRATION is an agency of the United States Government.

4. On February 18, 1971, the Defendants accepted, on behalf of the United States Government, the offer extended by Applicant GATEWAY CENTER CORPORATION to lease office space to the United States Government in an office building which was to be constructed by the Applicant GATEWAY CENTER CORPORATION at 36th and Market Streets, Philadelphia, Pennsylvania. The Plaintiff contends that the Defendants' acceptance of Applicant GATEWAY CENTER CORPORATION's offer was illegal. The validity of the award of this contract to the Applicant GATEWAY CENTER CORPORATION, and the payment of rents under the lease signed pursuant thereto, constitute the subject matter of this action.

5. The Court's disposition of this action may, as a practical matter, impair and impede the Applicant GATEWAY CENTER CORPORATION's ability to protect its interest by declaring unlawful the Defendants' acceptance of Applicant's offer and enjoining the United States Government from moving its offices into Applicant's office building or paying rent to Applicant GATEWAY CENTER CORPORATION.

6. The interests of the Defendants and the Applicant are not the same since Defendants are required to obtain office space somewhere in Philadelphia, while Applicant must find a tenant for its office building.

7. The interest of Applicant GATEWAY CENTER CORPORATION is not adequately represented by the existing parties.

8. This Motion to Intervene is not opposed by any of he existing parties.

WHEREFORE, the Applicant GATEWAY CENTER CORPORAION prays this Court to grant its Motion and permit it to ntervene as a Party Defendant in this action.

OBERMAYER, REBMANN, MAXWELL & HIPPEL,

By: JOHN P. McKELLIGOTT,
John P. McKelligott, Esquire,

By: DAVID F. MAXWELL,
David F. Maxwell, Esquire,
Attorneys for Applicant.

DATED: June 26, 1973

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Civil Action No. 71-2262.

JOHN W. MERRIAM

v.

ROBERT L. KUNZIG, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, A. J. SAMPSON, COMMISSIONER, PUBLIC BUILDING SERVICE OF THE GENERAL SERVICES ADMINITRATION, L. M. SHIPP, JR., ASSISTANT COMMISSIONER, SPACE MANAGEMENT OF THE GENERAL SERVICES ADMINISTRATION AND THE GENERAL SERVICES ADMINISTRATION OF THE UNITED STATES OF AMERICA

and

GATEWAY CENTER CORPORATION.

ANSWER.

FIRST DEFENSE.

The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE.

The allegations contained in Paragraphs 1, 3, 5, 44 and 46 of the Complaint are hereby admitted. The allegations

ontained in Paragraph 2 of the Complaint are denied, ince the Plaintiff has stated the former positions of these)efendants. The allegations contained in Paragraphs 11 hrough 16, inclusive, 19 through 25, inclusive, 27, 29, 31, 3, 35, 37 through 43, inclusive, and 45 of the Complaint re hereby denied.

The Defendant does not have sufficient information to orm a belief as to the truth of the allegations contained n Paragraphs 4, 8 and 9 of the Complaint, and it therefore lenies them. Strict proof, if material, is demanded at rial.

In response to the allegations contained in Paragraphs , 7 and 18 of the Complaint, the Defendant states that olicitation for Offers NEG (70)-63 speaks for itself. A rue and correct copy of the aforesaid Solicitation for)ffers is attached hereto, incorporated herein by reference, nd marked Exhibit "A".

In response to the allegations contained in Paragraphs 0, 28, 30, 32, 34, and 36 of the Complaint, the Defendant esponds that the offer of Gateway Center Corporation peaks for itself. A true and correct copy of the aforesaid)ffer is attached hereto, incorporated herein by reference, nd marked Exhibit "B".

In response to the allegations contained in Paragraph 7 of the Complaint, the Defendant re-alleges each and very allegation contained in Paragraphs 1 through 14, in-lusive, of this Answer and incorporates them herein by eference.

In response to the allegations contained in Paragraph 6 of the Complaint, the Defendant re-alleges each and very allegation contained in Paragraphs 17 through 24, nclusive, of this Answer and incorporates them herein by eference.

WHEREFORE, the Defendant, Gateway Center Corporation, prays this Court to render judgment in its favor, and against the Plaintiff.

OBERMAYER, REBMANN, MAXWELL & HIPPELL,

By: .....
John P. McKelligott, Esquire

By: .....
David F. Maxwell, Esquire

ADDITIONAL STATUTES INVOLVED.

Independent Offices Appropriations Act of 1970, 83 Stat. 1221.1.

No part of any appropriation contained in this Act shall be used for the payment of rental on lease agreements for the accommodation of Federal agencies and buildings and improvements which are to be erected by the lessor for such agencies at an estimated cost in excess of $200,000 . . . *Provided* that the foregoing proviso shall not be applicable projects for which a prospectus for the lease construction of space has been submitted to the Congress and approval made in the same manner as for the public buildings construction projects pursuant to the Public Buildings Act of 1959.

Public Buildings Act of 1959, 40 U. S. C. § 606.

Approval of proposed projects by Congress—Limitation of funds; transmission to Congress of prospectus of proposed project

(a) In order to insure the equitable distribution of public buildings throughout the United States with due regard for the comparative urgency of need for such buildings, except as provided in section 603 of this title, no appropriation shall be made to construct any public building or to acquire any building to be used as a public building involving an expenditure in excess of $100,000, and no appropriation shall be made to alter any public building involving an expenditure in excess of $200,000, if such construction, alteration, or acquisition has not been approved by resolutions adopted by the Committee on Public Works of the

Senate and House of Representatives, respectively, and such approval has not been rescinded as provided in subsection (c) of this section. For the purpose of securing consideration of such approval the Administrator shall transmit to Congress a prospectus of the proposed project, including (but not limited to)—

(1) a brief description of the building to be constructed, altered, or acquired under this chapter;

(2) the location of the project, and an estimate of the maximum cost of the project;

(3) a comprehensive plan for providing space for all Government officers and employees in the locality of the proposed project, having due regard for suitable space which may continue to be available in existing Government-owned buildings and in rented buildings;

(4) a statement by the Administrator that suitable space owned by the Government is not available and that suitable rental space is not available at a price commensurate with that to be afforded through the proposed action; and

(5) a statement of rents and other housing costs currently being paid by the Government for Federal agencies to be housed in the building to be constructed, altered, or acquired.

FILE COPY

Supreme Court, U. S.
FILED
SEP 14 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-180

GATEWAY CENTER CORPORATION, *Petitioner*

and

ROBERT L. KUNZIG, Administrator, General Services Administration, A. J. SAMPSON, Commissioner, Public Building Service of the General Services Administration, L. M. SHIPP, JR., Assistant Commissioner, Space Management of the General Services Administration and the GENERAL SERVICES ADMINISTRATION, of the United States of America,

v.

JOHN W. MERRIAM, *Respondent*

Reply Brief In Answer To Respondent's Brief In Opposition

DAVID F. MAXWELL

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107

In his jurisdictional statement, the respondent in opposition, John W. Merriam, challenges the petitioner's right to file its petition for certiorari in this Court. Plaintiff maintains that the petitioner, Gateway Center Corporation, is not a "party" within the meaning of 28 U.S.C. §1254(1), a Statute which confers jurisdiction upon this Court to review decisions of the various Courts of Appeals.

> "[b]y writ of certiorari granted upon the petition of *any party* to any civil or criminal case, before or after rendition of judgment or decree . . . [Emphasis added.]"

In his brief, respondent does admit that the petitioner, Gateway Center Corporation, has intervened in this case, and he did include Gateway's Motion to Intervene (A. 33a, et seq.) and answer (A. 36a, et seq.) in his supplemental appendix. However, respondent in opposition neglected to include the stipulation, signed by his counsel, as well as counsel for the federal defendants, in which it was agreed that the general intervention of Gateway Center Corporation was unopposed. An examination of Judge Hannum's order in the District Court demonstrates that, despite the contrary allegations in the jurisdictional statement of respondent in opposition, no conditions were attached to Gateway's intervention. The petitioner has included a copy of both the stipulation of counsel (p. 4) and the order of the District Court (p. 5) in its supplement to the appendix.

Therefore, the contention of respondent in opposition that petitioner is not proper "party" is clearly erroneous: 28 U.S.C. §1254(1) states that "any party to any civil or criminal case" may obtain review upon petition for certiorari. In *Commercial Electrical Supply Co. v. Curtis*, the Circuit Court of Appeals held that a party was bound by an order rendered just before his intervention, since he failed to appeal that order:

> "[i]t is the general rule that one who voluntarily intervenes in a suit in equity thereby becomes a party to the suit, is in the same situation, bound by the same orders and decrees, and subject to the same estoppels, as though he had been a party from the commencement thereof." 288 F. 657, 659 (8th Cir. 1923); 152 U.S. 590, 14 S. Ct. 693, 38 L. Ed. 563 (1893).

Furthermore, the petitioner is a party truly "affected" by the decision of the Court of Appeals, and it is therefore "aggrieved" since that order is erroneous. Certainly the petitioner is at least as "affected" by the Court of Appeals decision to reverse the summary judgment granted to the defendants in the District Court as were the federal defendants, since the respondent in opposition seeks to deprive petitioner of its primary tenant. Indeed, the petitioner is more "affected" by the Court of Appeals decision than are the federal defendants, since it may not be able to immediately obtain new tenants, whereas the federal agencies could obviously be moved from the Gateway Building to other offices.

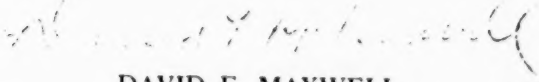
Indeed, the petitioner's situation is similar to that presented in *Norman's on the Waterfront, Inc. v. Wheatley* (3d Cir. 1971), 444 F.2d 1011, where an out-of-state liquor distributor seeking to penetrate the local market contended that the state fair trade law violated the antitrust statutes and successfully enjoined state officials from enforcing the fair trade law. Circuit Judge Adams permitted an appeal by local liquor distributors who intervened after the injunction was granted:

> "Norman's contends the intervenors have no standing to appeal because no relief was sought or granted against them. By its terms, the District Court's order enjoined only the Board of Alcoholic Beverages and its chairman. However, this fact alone does not necessarily preclude the intervenor's appeal. Fishgold v. Sullivan Drydock & Repairs Corp.,

328 U.S. 275, 66 S. Ct. 1105, 90 L. Ed. 1230 (1946). According to one leading commentator, "[t]he intervenor, once intervention has been allowed, has the right to appeal from all interlocutory and final orders which *affect* him" (Emphasis added). Put another way, "[o]ne who has become a party by intervention . . . is entitled, *if aggrieved*, to appeal" (Emphasis added). 444 F.2d 1011, 1013 (3d Cir. 1971); see also 9 Moore's Federal Practice §203.06.

So too, in this case, Petitioner, Gateway Center Corporation, clearly has standing, under 28 U.S.C. §1254(1), to file this Petition for Certiorari in the United States Supreme Court.

Respectfully submitted,



DAVID F. MAXWELL
Attorney for Petitioner
Gateway Center Corporation

Of Counsel:
OBERMAYER, REBMANN, MAXWELL & HIPPEL
14th Floor Packard Building
Philadelphia, Pennsylvania 19102

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-2262

JOHN W. MERRIAM

v.

ROBERT L. KUNZIG, Administrator,
General Services Administration,
A. J. SAMPSON, Commissioner,
Public Building Services of the
General Services Administration,
L. M. SHIPP, JR., Assistant Commissioner, Space Management of the
General Services Administration and
The GENERAL SERVICES ADMINISTRATION
of the United States of America

STIPULATION OF COUNSEL

It is hereby stipulated that counsel for the Plaintiff and counsel for the Defendants consent to the intervention of GATEWAY CENTER CORPORATION as a party Defendant in the above-entitled action.

STRADLEY, RONON, STEVENS & YOUNG

By:
United States Attorney

By:
J CLAYTON UNDERCOFFLER, III, ESQUIRE
First Assistant United States Attorney,
Counsel for Defendants

Date: June 26, 1973

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-2262

JOHN W. MERRIAM

v.

ROBERT L. KUNZIG, Administrator,
General Services Administration,
A. J. SAMPSON, Commissioner,
Public Building Service of the
General Services Administration,
L. M. SHIPP, JR., Assistant Commissioner, Space Management of the
General Services Administration and
the GENERAL SERVICES ADMINISTRATION
of the United States of America

ORDER

AND NOW, to wit, this 28th day of June, 1973, it is hereby ORDERED that Gateway Center Corporation be permitted to intervene as a party Defendant in this action.

BY THE COURT:

J.

Dated:

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-180

GATEWAY CENTER CORPORATION, PETITIONER

v.

JOHN W. MERRIAM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT ADMINISTRATOR OF THE GENERAL SERVICES ADMINISTRATION[1]

1. This is an action by an unsuccessful lessor of office space (John W. Merriam) to invalidate a lease negotiated by the General Services Administration ("GSA") with another lessor. After negotiating with several persons, GSA accepted an offer by the Gateway Center Corporation ("Gateway") to enter into a long-term lease to the government of a privately owned building in Philadelphia. The district court granted summary judgment to the government, holding that Merriam lacked standing to sue.[2] The court of appeals

[1] The Administrator was a party in the court of appeals and accordingly is a party respondent in this Court (Rule 21(4) of the Rules of this Court), although he is not listed in the caption.

[2] Because of its disposition of the case, the district court did not reach the merits. The award was also appealed to the General Accounting Office, which upheld the transaction.

reversed, holding that Merriam had standing under 41 U.S.C. 253 and a line of decisions of the United States Court of Appeals for the District of Columbia Circuit beginning with *Scanwell Laboratories, Inc.* v. *Shaffer*, 424 F. 2d 859.

2. The government disagrees with the *Scanwell* decision, which is inconsistent with this Court's ruling in *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113. Nonetheless, we do not believe that this case, in its present posture and as we interpret the opinion of the court of appeals, is an appropriate vehicle for this Court to consider the issue. Accordingly, the government appellees have not petitioned for a writ of certiorari.

This case is unlike the typical disappointed bidder cases which have arisen under *Scanwell*, since here the court of appeals concluded that the complaint alleged in effect a fraud by a competing bidder in the inducement of the contract award. Furthermore, the complaint relies primarily and directly upon a statutory provision rather than upon implementing procurement regulations adopted by the government solely for the guidance of its procurement officials. Finally, the court of appeals acted on the mistaken assumption that competitive bidding rather than a negotiated contract was involved.[3] In its opinion denying rehearing, however, the court of appeals indicated that the record could be corrected in that respect on remand (Pet. App. 89a):

---

[3] The record shows that the district court and the parties were aware that this was a negotiated contract. See plaintiff's complaint, pp. 5, 9, 10, 12, 16; district court opinion Pet. App. 38a, para. 2; GAO letters, Pet. App. 19a, 20a; all referring to "negotiations," and to the original "solicitation for offers." Technically, competitive procurement is initiated by an "invitation for bids," and is governed by 41 U.S.C. 253. Negotiated procurement is initiated by a "solicitation for offers," and is governed by 41 U.S.C. 254.

> Our holding is limited to a reversal of a grant of summary judgment, however, and does not foreclose the district court from considering a different theory of defense to the action on a different record if it deems that course to be proper. As was suggested in note 7 to the panel opinion, the district court must also consider whether Merriam may have standing even aside from the Federal Property and Administrative Services Act of 1949.

We believe that, in general, potential suppliers do not have a sufficient legal interest to challenge the award of contracts reached *either* by competitive bidding or negotiation (whether or not competitive). The case against such suits is strongest, however, where a negotiated contract is involved, for the government then must evaluate competing proposals upon the basis of a number of factors, including price, design, the firm's abilities and sometimes location of the property. Typically, negotiated contracts relate to products or services that cannot be readily mass produced or are otherwise unique, such as major office complexes. Accordingly, the government has even broader discretion in selecting its supplier in such procurements than it has in procurement through competitive bidding. In any event, since this case was decided on an erroneous premise which is subject to correction in later proceedings, it is not ripe for review.

In these circumstances, we do not believe that the Court should grant the petition. If, however, the Court should conclude, contrary to our belief, that the court of appeals has definitively determined that this was a competitively-let rather than a negotiated contract, then the case would present an important issue warranting review. As indicated above, permitting potential suppliers to challenge the award of government contracts

to competitors would cause serious interference with th proper operation of the vast procurement activities o the federal government. We think that unsuccessfu suppliers cannot challenge an award of even a competi tively-bid contract. If the court of appeals has permitte unsuccessful suppliers to challenge the award of negotiated contract, this would constitute an even mor serious interference with government procurement. decision with such a significant impact would, we believ clearly warrant review by this Court.

If the petition is granted, however, we would suppor the petitioner's contention that Merriam did not have legal interest sufficient to maintain the suit, as we as its contentions with regard to applicability of th Independent Offices and Department of Housing an Urban Development Appropriation Act, 1971 and th Public Buildings Act Amendments of 1972.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.

DOJ-1973-09